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Summary

Canada Post Corporation, *applicant*, and Canadian Union of Postal Workers, Darrell Tingley, Cindy McCallum, David Condon, Gord Fischer, Dale Meier, Maggie Isbell, Ian Lawn, *respondents*.

Board File: 725-402

CLRB/CCRT Decision no. 1212
October 17, 1997

The Board is dealing here with an application by the Employer pursuant to section 91 of the Code alleging that the Union has declared an illegal strike and that employees are participating in such a strike by their concerted refusal to wear their corporate uniforms.

The Board found that the employees' concerted refusal to wear their uniforms did not per se restrict or limit output and was designed to express support for the Union's bargaining position.

The Board found that it was the Employer's decision to prevent the employees who were refusing to wear uniforms from delivering the mail which restricted or limited output.

The application was dismissed.

Résumé

La Société canadienne des postes, *requérante*, et le Syndicat des travailleurs et travailleuses des postes, Darrell Tingley, Cindy McCallum, David Condon, Gord Fischer, Dale Meier, Maggie Isbell, Ian Lawn, *intimés*.

Dossier du Conseil: 725-402

CLRB/CCRT Décision n° 1212
le 17 octobre 1997

Le Conseil est saisi d'une requête de l'Employeur en vertu de l'article 91 du Code alléguant que le Syndicat a déclaré une grève illégale et que des employés participent à une telle grève par leur refus concerté de porter leur uniforme corporatif.

Le Conseil a déterminé que le refus concerté des employés de porter leur uniforme n'avait pas, en soi, pour effet de diminuer ou de limiter le rendement et avait pour objet l'expression de leur appui à la position du Syndicat à la table de négociation.

Le Conseil a déterminé que c'était la décision de l'Employeur d'interdire aux employés qui ne portaient pas leur uniforme de livrer le courrier qui a diminué ou limité le rendement.

La requête a été rejetée.



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LES MOTIFS DE DÉCISION DU CCRT SONT
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Reasons for decision

Canada Post Corporation,

applicant,

and

Canadian Union of Postal Workers,
Darrell Tingley,
Cindy McCallum,
David Condon,
Gord Fischer,
Dale Meier,
Maggie Isbell,
Ian Lawn,

respondents.

Board File: 725-402

CLRB/CCRT Decision no. 1212

October 17, 1997

The Board consisted of Mr. J. Philippe Morneau, Vice-Chairman and Ms. Véronique L. Marleau and Mr. David Gourdeau, Members. A hearing was held on September 18, 25 and 26, at Winnipeg.

Appearances:

Mr. Roy C. Filion, Q.C., assisted by Mr. David P. Olsen, Assistant General Counsel and Mr. Fred Alaggia and Mr. Daryn Jeffries, for the applicant and Mr. James K.A. Hayes, assisted by Mr. Gordon Fischer, Regional Grievance Officer, and Ms. Joanne Miller, for the respondents.

These reasons for decision were delivered orally at the close of the hearing at Winnipeg on September 26, 1997.

I

This is an application by the Canada Post Corporation (Canada Post or the Employer) pursuant to s.91 of the Canada Labour Code (Part I - Industrial Relations) alleging that the Canadian Union of Postal Workers (CUPW or the Union) and others are engaged in illegal strike activity by refusing, in a concerted fashion, to wear their uniforms.

In the course of the hearing, it was alleged that similar occurrences and other activities were taking place in Quebec. This decision however only covers that part of the application which deals with the concerted refusal by letter carriers and mail service couriers to wear uniforms. The other allegations will be heard at a subsequent hearing.

In order to expedite the hearing, the parties agreed that any admissions made by the Union would not be binding on it in any other proceedings and Canada Post specifically agreed not to use such at any arbitration hearings that may take place on this issue. We take note of this agreement.

A "strike" is defined in section 3. of the Code as follows:

"strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output."
(emphasis added)

II

The material facts are as follows:

In the course of collective bargaining, the Union issued several bulletins to its members calling upon them to challenge the Employer's position at the bargaining table. The Union decided, as a bargaining tactic, to encourage its members not to wear their uniforms as a show of solidarity for the Union's bargaining position. As a result of this, on several occasions, letter carriers and mail service couriers showed up at work saying that they were ready, willing and able to deliver the mail, but refusing to wear their uniforms while so doing.

The Union admits to this occurrence and admits that it is "concerted activity on the part of employees".

On becoming aware that letter carriers and mail service couriers were refusing to wear their uniforms, the Employer refused to permit them to deliver the mail and suspended most of them for the balance of the day.

III

The Employer claims that the concerted refusal of the employees to wear their uniforms amounts to a strike as defined under the Canada Labour Code and constitutes an illegal strike since it is occurring in a period when the Union is not in a legal strike position.

The Employer further submits that the employees' concerted refusal to follow the uniform dress policy, set out in part in article 34 of the collective agreement, gives the Employer no other alternative than to suspend the employees, that this Employer

reaction is reasonable and predictable and that consequently, the refusal to wear uniforms is an activity "designed to restrict or limit output".

The Employer argues that the Union bulletins distributed prior to the concerted refusal to wear the corporate uniform encouraged employees to "take the matters into their own hands" and bring the demonstration into the workplace. The Employer asserts that this clearly showed that these actions were intended to disrupt the workplace and reduce output.

The Employer further asserts that this expression of support for CUPW had caused disturbance and interfered with the quantity of work done by employees by causing delays in the delivery of mail.

The Union argues that, while it admits to taking concerted action not to wear uniforms, this does not constitute a strike as defined in the Code. It is a concerted activity, but not a "concerted activity on the part of employees in relation to their work that is designed to restrict or limit output." (emphasis added)

It is common ground between the parties that the failure to wear uniforms would not restrict or limit output without the Employer's decision to stop employees from delivering the mail where they refuse to adhere to the uniform policy.

IV

The refusal to comply with the dress policy set forth in the collective agreement (art. 34) exposes employees to disciplinary action. While, pursuant to s. 8(1) of the Code, employees have the right to participate in their union's lawful activities and generally show solidarity vis-à-vis their union, an employer is not prohibited from disciplining employees or otherwise running its business.

Where the trade union activity consists of employees displaying support for their bargaining agent on their persons or clothing, the employer cannot claim this action to constitute an illegal strike unless it interferes with the employees' ability to work.

The Employer argued that the employees' concerted action was designed to and did unduly interfere with its operations or legitimate interests.

In our view, what took place here was not a refusal to perform work. The evidence was clear that the employees did not refuse to work and were prepared to carry out their duties without wearing their full corporate uniform. The Employer reacted by sending the employees home to change and by assigning outside work only to those in full uniforms; that is the situation that led to delays in the delivery of mail.

While at first glance, the Union bulletins certainly lend support to the Employer's assertion that there was an intent to affect productivity, the alleged causal link between the employees' concerted action and the delays in the delivery of mail must be examined having regard to the undisputed fact that the employees were expressly willing to perform their work and that it was the Employer's decision to send them home that gave rise to the delays.

While an employer is entitled to make clothing rules or implement a dress code, provided such rules are reasonable and based on legitimate and cogent business concerns that the employees dress or appearance will affect the employer's business, expressing union support for a bargaining agent on one's clothing during a period of collective bargaining in the days preceding the achievement of a legal strike position is not necessarily incompatible with an orderly workplace.

As was stated in Mississauga Hydro Electric Company [1994] OLRB Rep. Oct. 1376, at para 27:

"...we are unable to see what is necessarily wrong with employees declaring their support for their trade union in the workplace, particularly in the context of ongoing collective bargaining between the trade union and the employer. Collective bargaining is not a tea party. Often it is a test of wills. In the context of the collective bargaining process, it is unrealistic to suggest that such expressions of support can or should be kept out of the workplace. Collective bargaining disputes are about the workplace and inevitably permeate the workplace to some degree."


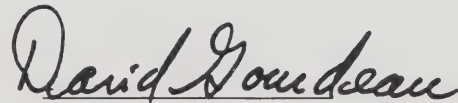
In our view, although somewhat provocative, the employees' behaviour (namely, refusing to wear the complete corporate uniform) in this context was not offensive, did not malign Canada Post and was not intended to interfere with Canada Post's operation.

What is critical here is that it was the Employer's corporate decision to insist on refusing their show of solidarity that caused the delay, namely, the limitation of output. It is important to note that no evidence was adduced showing that this expression of support affected Canada Post's relations with its customers or undermined public confidence in the postal service. It is also obvious that the existence and nature of the collective bargaining dispute between the parties was no secret.

In the circumstances, we are satisfied that the bargaining unit employees who came to work without their full corporate uniform did so for the purpose of expressing support for their trade union and not to otherwise limit or restrict output. Canada Post refused to allow such employees to continue to work with a view to ensure compliance with the corporation's dress code, a policy which forms part of the collective agreement. The bargaining unit employees refused to accept their

Employer's ultimatum thereby subjecting themselves to disciplinary action. However, the employees were not refusing to work or otherwise acting in concert to limit or restrict their Employer's output.

Accordingly, the application is dismissed as far as it relates to the matter before us pertaining to the refusal to wear the corporate uniform. The Board retains jurisdiction to deal with the other aspects of the application pertaining to subsequent events.


J. Philippe Morneault
Vice-Chair
Véronique L. Marleau
Member
David Gourdeau
Member

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Summary

Gary Ferguson, *complainant*, Canadian Postmasters and Assistants Association, *respondent*, and Canada Post Corporation, *employer*.

Board File: 745-5451
CCRT/CLRB Decision no. 1213
November 18, 1997

This case deals with a complaint of unfair labour practice in which the complainant alleged that the Canadian Postmasters and Assistants Association violated section 37.

The complainant argued that the union represented him in an arbitrary manner with respect to events leading to his dismissal, specifically, by recommending that he resign rather than file a grievance. The union submitted that its recommendation was based on an investigation that allowed him to consider all relevant facts and to assess the chances of success of a dismissal grievance at arbitration.

The Board considered that the union did not act in a discriminatory manner or in bad faith. However, the Board found that the union had handled the complainant's file in a superficial manner and that its conduct showed serious negligence that was tantamount to arbitrary conduct in contravention of the Code.

When they made their decision, the union representatives did not have in their possession all the information that would have allowed them to make an informed decision

Résumé

Gary Ferguson, *plaignant*, Association canadienne des maîtres de poste et adjoints, *intimée*, et Société canadienne des postes, *employeur*.

Dossier du Conseil: 745-5451
CCRT/CLRB Décision n° 1213
le 18 novembre 1997

Il s'agit d'une plainte de pratique déloyale dans laquelle le plaignant allègue que l'Association canadienne des maîtres de poste et adjoints a violé l'article 37.

Le plaignant prétend que le syndicat l'a représenté de manière arbitraire à l'occasion d'événements qui ont conduit à son congédiement, notamment, en lui recommandant de démissionner plutôt que de présenter un grief. Le syndicat maintient que sa recommandation était fondée sur une enquête qui lui a permis de considérer tous les faits pertinents et d'évaluer les chances de succès à l'arbitrage d'un grief de congédiement.

Le Conseil estime que le syndicat n'a pas agi de manière discriminatoire ou de mauvaise foi. Le Conseil juge cependant que le syndicat a traité le dossier du plaignant de façon superficielle et que son comportement démontre de la négligence grave équivalant à une conduite arbitraire contraire au Code.

Au moment où ils ont pris leurs décisions, les représentants syndicaux n'avaient pas en mains tous les renseignements qui leur auraient permis de prendre une décision

after seriously examining the file, given the union's failure to conduct a full investigation of all the elements of the case.

The Board considered the serious consequences of the union's failure to conduct a full investigation, given that the complainant was faced with the most severe sanction possible, that is, dismissal, and he had an unblemished record.

The Board ordered the union to file a grievance on behalf of the complainant and to refer it to arbitration.

éclairée après une analyse sérieuse du dossier étant donné que le syndicat n'avait pas procédé à une enquête complète sur l'ensemble des éléments du dossier.

Le Conseil a pris en considération les conséquences graves du défaut du syndicat de procéder à une telle enquête dans le cas présent, alors que le plaignant faisait face à la mesure la plus sévère qui soit, le congédiement, et que son dossier disciplinaire était vierge.

Le Conseil a ordonné au syndicat de déposer un grief au nom du plaignant et de le renvoyer à l'arbitrage.

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Reasons for decision

Gary Ferguson,

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Canadian Postmasters and Assistants
Association,

respondent,

and

Canada Post Corporation,

employer.

Board File: 745-5451

CCRT/CLRB Decision no. 1213

November 18, 1997

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members. A hearing was held at Bathurst, New Brunswick, on August 19 and 20, 1997.

Appearances

Mr. Jean-Guy Savoie, for the complainant;

Mr. Sean McGee, accompanied by Mr. Roger Boudreau, President/CPAA, Maritimes Section, for the Canadian Postmasters and Assistants Association; and

Ms. Stéfanie Germain, accompanied by Mr. Omer LeBlanc, Representative, Retail Sales, for Canada Post Corporation.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

Gary Ferguson ("the complainant") worked for the Canada Post Corporation ("CPC" or "the employer") from 1985 until his dismissal on May 6, 1996. He was first an assistant postmaster and, at the time of his dismissal, he had held the position of postmaster in Sheila, New Brunswick, for six years.

Mr. Ferguson claims that the Canadian Postmasters and Assistants Association ("CPAA" or "the union") violated section 37 of the Code, which reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The complainant alleges that the union represented him in an arbitrary manner at the time of the events that led to his dismissal, in particular by failing to provide him with the necessary assistance and by recommending that he resign rather than grieve his dismissal.

The union submits that it did not act in an arbitrary manner and that it complied with section 37 of the Code. Union officials assisted Mr. Ferguson and represented him at all the stages of the disciplinary process. The union recommended that the complainant resign rather than file a grievance. The union insists that its recommendation was based on an independent investigation that enabled it to review all relevant facts and to assess the chances a dismissal grievance had of succeeding at arbitration. The union maintains that it did not refuse to file a grievance on the complainant's behalf.

II

The relevant facts of this case may be summarized as follows.

Late in the afternoon on April 9, 1996, the complainant took \$200 from his cash box. He did not repay that amount immediately, as he usually did, because he had no personal cheques in his possession. He intended to repay the amount the next morning, but did not do so. On April 10, he did not report for work, but asked to be admitted to a detox centre. Mr. Ferguson had for some time experienced alcohol-related problems and, as the centre was prepared to admit him immediately, he seized the opportunity. He stayed at the detox centre until April 27, 1996.

On the morning of April 10, 1996, the complainant tried to reach his immediate supervisor, Omer LeBlanc, retail sales representative for the Chaleur Region, to notify him that he would be absent from work. As he could not reach him, he left a message on his pager. Mr. LeBlanc says that he did not get that message. He adds, however, that the message might have been erased too soon for him to get it. In actual fact, Mr. LeBlanc was informed on April 10 by employees at the Sheila post office that Mr. Ferguson was absent. Around 10:00 a.m. on April 11, a friend of the complainant confirmed with Mr. Leblanc that the complainant was at the detox centre.

On April 11, 1996, Mr. LeBlanc carried out an internal audit at the Sheila post office, together with Ms. Suzanne Cormier, a field support postmaster. The audit showed that Mr. Ferguson's cash box was short \$1,378.01. This was the first time such a large shortage had been noted in Mr. Ferguson's cash box. Audits on a few previous occasions had revealed shortages of as much as \$40, as was also the case at times for other employees. Mr. Ferguson had always repaid those amounts. He had even had to repay \$600 after accepting a personal cheque that was not honoured. Mr. Ferguson was never disciplined for incurring cash shortages. In this case, on the strength of the findings of the April 11 audit, Mr. LeBlanc suspended the complainant indefinitely

that same day. At the detox centre, roughly two days later, the complainant received a notice of suspension stating that he would be summoned to an interview.

According to the complainant, before receiving this notice of disciplinary action, he spoke on the telephone with Mr. LeBlanc, who informed him of the audit findings. Mr. Ferguson was not surprised at the time, knowing that he had not repaid the \$200 as he had intended to do. Mr. LeBlanc told him, however, that the shortage was much larger, and Mr. Ferguson denied having taken any money other than the \$200. Mr. LeBlanc admitted that the complainant told him at that point that he had taken money from his cash box, although he did not specify the amount. According to the complainant, the practice of cashing personal cheques has been followed since he started work in 1986. The postmaster who was his supervisor at that time was aware of the practice, and the complainant had continued that practice when he became postmaster. Between January 11 and February 22, 1996, Mr. Ferguson cashed personal cheques on at least nine occasions for amounts varying from \$60 to \$250.

The complainant further stated that his cash box did not lock shut and that money had been reported missing from the Sheila post office prior to the events at issue. The RCMP investigated the matter. He also mentioned he had learned that money had disappeared following his departure. These facts were not disputed by the other witnesses.

As soon as he received the notice of suspension, the complainant contacted his union representative, Roger Boudreau, President of the CPAA for the Maritimes Region. Messrs. Boudreau and Ferguson spoke on the telephone with the complainant on four separate occasions during his stay at the detox centre. In response to Mr. Ferguson's concerns about the allegation that there had been a shortage of \$1,378.01, Mr. Boudreau always tried to reassure Mr. Ferguson, telling him that Mr. LeBlanc was following standard procedure and that he would assist him at the disciplinary interview referred to in the notice. That interview, which according to article

6.02(a)(i) of the collective agreement must be held within 24 hours of receipt of the notice of disciplinary action, was postponed until after the complainant left the detox centre.

During these conversations, however, Mr. Boudreau did not try to obtain the complainant's version of the employer's allegations. He explains that he did not discuss the matter with Mr. Ferguson because he did not want to disturb him during his treatment by questioning him about his version of the facts. Mr. Boudreau also states that he wanted to hear what the employer would say at the disciplinary interview before taking a position. Lastly, he informed the Board that he had the impression that Mr. LeBlanc was investigating an alleged criminal offence within the meaning of article 6.02(b)(ii) of the collective agreement. According to this provision, if a postal inspector investigates an alleged criminal matter and the evidence is likely to be destroyed, the employer need not give the employee and the union the 24-hour advance notice provided for in article 6.02(a), but that such notice will be sent to the local only, provided it does not communicate with the employee prior to the interview.

In the meantime, however, Mr. Boudreau communicated with Ms. Suzanne Cormier, who had conducted the April 11 audit, together with Mr. LeBlanc, to ensure that the findings of the audit that he had in his possession were in fact consistent with the observations she had made at the time.

Mr. Ferguson left the detox centre on April 27. On April 29, he received a notice from Mr. LeBlanc informing him that the disciplinary interview would be held at 3:00 p.m. on April 30. According to the notice, the cash shortage of \$1,630.74 established by the audit, not \$1,378.01, as stated in the notice of suspension of April 11, would be discussed at that meeting.

On April 30, 1996, Mr. Boudreau went to Mr. Ferguson's home between 2:15 p.m. and 2:30 p.m. According to the complainant, Mr. Boudreau did not question him at that time about the circumstances of the alleged shortage or about his claims concerning the merits of the allegation. Mr. Boudreau simply asked him whether he had taken the money involved and told him not to be afraid and to answer the questions, although he did say that his chances were slim. Mr. Ferguson maintains that he informed Mr. Boudreau about the incident involving the \$200 prior to the disciplinary interview, as he informed Mr. LeBlanc while he was at the centre.

Mr. Boudreau claims that he learned about the incident involving the \$200 at the interview. The complainant told Mr. LeBlanc at that time that he had had nothing to do with the cash shortage, but added that he had taken \$200 which he had not repaid because of his sudden admission to the detox centre. According to Mr. Boudreau, the complainant's admission caught him so far off guard that he did not know what to do. In his opinion the admission was fatal and, from that moment, it was pointless to dwell on or examine the allegation concerning the cash shortage. In Mr. Boudreau's view, the situation was so prejudicial to the complainant that the cash shortage allegation, which was the reason for the complainant's suspension and was supposed to be the subject of the interview, became superfluous and negligible. It was for that reason that he had asked the complainant at that time whether he was prepared to accept certain conditions by way of disciplinary measures for having taken \$200. Mr. Boudreau was thinking, for example, of a suspension equivalent to the length of his stay at the detox centre or any other disciplinary action on which an agreement could be reached with the employer.

During the interview, Mr. LeBlanc asked the complainant whether he had already worked under the influence of alcohol or other substances. Mr. Boudreau did not object to these questions, even though the only subject on the agenda was an explanation for the cash shortage. Mr. Boudreau wanted to allow the complainant to

provide all the explanations he thought would help justify his behaviour, explanations which, in his view, would help defend Mr. Ferguson more effectively.

Mr. Ferguson states that he was quite shaken by what happened at the interview, from which he emerged no less concerned about the consequences of the allegations of a significant cash shortage. When he insisted on knowing what could be done, Mr. Boudreau responded that nothing could be done for the moment and that they had to wait for the employer's decision.

The employer's decision was communicated to the complainant on May 7, 1996, by means of a notice of dismissal dated May 6, 1996. The employer based his decision on two grounds: first, Mr. Ferguson had admitted during the interview that he had taken \$200 and, second, he had stolen or converted \$1,400, which was identified as missing during the April 11 audit. The \$1,400 was not one of the amounts mentioned in the notice of suspension and the notice of meeting.

The complainant immediately contacted Mr. Boudreau, who recommended that he not file a grievance since, in his view, it had no chance of succeeding. Instead, Mr. Boudreau recommended that the complainant tender his resignation that same day and backdate his letter of resignation to May 3. In fact, Mr. Boudreau explained that, in the previous few days, he had reached an agreement with the employer's Labour Relations Department in Ottawa under which terms the employer was prepared to accept the complainant's resignation, but action had to be taken quickly. Mr. Boudreau further indicated that this approach would entitle him to certain benefits provided for in the collective agreement, such as severance pay, payment for annual leave and good references, which he might lose if he filed a grievance in the circumstances.

Although Mr. Ferguson questioned Mr. Boudreau's recommendation and was annoyed that he was still being accused of taking \$1,400, which he had always denied, he

nevertheless prepared a letter of resignation dated May 3, 1996. He says that he sent the letter to the employer on the afternoon of May 7. During his conversation with Mr. Boudreau, because of his doubts as to the wisdom of resigning, the latter suggested that the complainant contact Ms. Rowena Anderson, the union's senior national vice-president.

Ms. Anderson spoke to the complainant on the morning of May 8 and tried to reassure Mr. Ferguson that the union's recommendation was valid. According to Ms. Anderson, the chances of Mr. Ferguson's grievance succeeding were, for all intents and purposes, nonexistent. Like Mr. Boudreau, she noted that Mr. Ferguson was very annoyed and concerned that the employer could still claim he had taken \$1,400. And like Mr. Boudreau, she explained to Mr. Ferguson that the important issue was not that, but rather that he make a choice that would allow him not to lose everything, considering that he had admitted taking money from the cash box.

Both Mr. Boudreau and Ms. Anderson told the Board that, in the union's view, this factor was determining at that time and that, from the union's experience, this type of situation was fatal at arbitration. Ms. Anderson told the Board, however, that she undoubtedly could have recommended that the complainant file a grievance, and try to convince an arbitrator that an employee should not be dismissed for taking \$200 in the circumstances, had Mr. Ferguson not had "a past history." Ms. Anderson was referring to the fact that the complainant had stayed at the same detox centre for three months in 1992 and had had other work attendance problems in 1994 for reasons related to substance abuse. In her view, the employer could have invoked those attendance problems at arbitration to justify its decision to dismiss the complainant for theft. In short, it was better for the complainant to resign since the actual reason for the dismissal was theft. On this point, according to Mr. Boudreau, if the employer thought it was theft, he did not see what he could do as union representative. However, Ms. Anderson and Mr. Boudreau explained to the Board that, if the complainant had insisted on filing a grievance, they would have accepted his decision.

III

The Board's role in considering a section 37 complaint is to examine the conduct of the union and its representatives in order to determine whether they acted in an arbitrary or discriminatory manner or in bad faith.

This examination must focus on the manner in which the union acted and must not result in the Board's substituting its opinion for that of the union as to whether a grievance should have been filed or referred to arbitration. In Lionel Arseneault (1988), 74 di 63 (CLRB no. 692), the Board stated the following about its role:

"... it must focus principally on the attitude and behaviour of the union and its officers in examining, analysing and processing a grievance. The union remains the body legally responsible for all the employees in a bargaining unit. It must act honestly, with an acute sense of responsibility, being careful not to display an attitude that is in bad faith, arbitrary or discriminatory. ..."

(page 67)

The Board therefore does not have to consider the appropriateness of the union's decision to file or not to file a grievance or to make any other decision it deems appropriate, such as the decision in this case to recommend that the complainant not file a grievance.

The Board also had the opportunity to consider the notion of arbitrariness set out in section 37 of the Code. In André Gingras (1994), 94 di 118; and 94 CLLC 16,059 (CLRB no. 1070), the Board recalled the relationship between the notions of arbitrariness and serious negligence:

"... Whereas discrimination and bad faith imply, among other things, an element of intent, such is not the case with serious negligence. The authors of the treatise Droit du Travail define the nature of the

semantic relationship between negligence and arbitrariness as follows:

'Arbitrariness closely resembles serious negligence and is often confused with it. It is present, for example, where the actions of the certified association have no objective or reasonable explanation: blind trust in information provided by the employer; lack of consideration for the employee's arguments; or failure to determine whether they have any factual or even legal basis.'

(Robert P. Gagnon et al., Collection de droit, Droit du Travail, Cahier de formation professionnelle du Barreau du Québec (École du Barreau, 1993), page 144; translation)

*Moreover, this notion will always be evaluated in light of several factors that include the nature or seriousness of the grievance, the characteristics of the bargaining agent having regard to its resources, its level of expertise and, of course, its specific efforts to discharge its statutory duty of representation (see in this regard André Cloutier, *supra*, at pages 226-230; 338-341; and 698-701)."*

(pages 123; and 14,493)

IV

After reviewing the evidence and the parties' submissions, the Board finds that the union violated section 37 of the Code.

In this case, the union handled the complainant's file in a superficial manner and its conduct showed serious negligence that was tantamount to arbitrary conduct in contravention of the Code. The duty of fair representation requires that the union consider all elements of the case in order to ensure that its decisions are not arbitrary within the meaning of the Code, which was not the case here.

The decision to recommend that Mr. Ferguson resign rather than challenge his dismissal through the grievance process was made without the union conducting a full and thorough investigation. At the time of their decision, the union representatives did

not have in their possession all the information that would have enabled them to make an informed decision based on a careful analysis of the complainant's file.

The union essentially accepted the employer's claims concerning the two reasons for dismissal. It did not obtain or try to obtain the complainant's version concerning those reasons, which the employer had the burden of proving before the grievance arbitrator.

The union never tried to obtain the complainant's version of the allegation of the significant cash shortage, which was the reason for the complainant's suspension and led to his dismissal for converting or stealing money, the amount of which varied with each of the employer's notices. Mr. Boudreau did nothing to prepare Mr. Ferguson for the disciplinary interview on April 30 at which the complainant had to respond to the employer's allegations and, if possible, justify his actions. Specifically, Mr. Boudreau did not submit the findings of the April 11 audit to Mr. Ferguson so he could check the nature and accuracy of the information provided by the employer and obtain the complainant's explanations so as to be able to represent him adequately. This attitude was all the more significant as it is customary for a postmaster who is the subject of an audit to be present on that occasion, which was not the case here. Nor did he conduct a serious inquiry into the circumstances surrounding the incident involving the \$200.

Although the Board accepts the reserved attitude Mr. Boudreau adopted when Mr. Ferguson was at the detox centre, there is no explanation or justification for his behaviour after the disciplinary interview was scheduled. The argument that Mr. Boudreau was waiting to see what the employer would say before taking a position reveals a misunderstanding of his role and careless conduct. In the circumstances, in view of the seriousness of the charge against the complainant and of the possible disciplinary consequences, this attitude was tantamount to arbitrary conduct in contravention of the Code. How could anyone reach the objective of the

April 29 disciplinary interview, at which Mr. Ferguson had to convince the employer that he had not done anything that could result in disciplinary action, if the union representative refused or failed to prepare him for the interview on the ground that he was waiting to see the position the employer would adopt?

Mr. Boudreau's explanation for refusing to discuss the matter with the complainant prior to the interview because Mr. LeBlanc was carrying out a criminal investigation is not credible and reveals an obvious ignorance of the provisions of the collective agreement. Mr. LeBlanc never suggested either to Mr. Boudreau or to Mr. Ferguson that he was acting as a postal inspector within the meaning of article 6.02(b)(ii) of the collective agreement. On the contrary, as the complainant's immediate supervisor, he followed the normal procedure with respect to notices of disciplinary action, which Mr. Boudreau moreover confirmed to the complainant while he was at the detox centre. Mr. Boudreau's claim in this regard has the ring of a justification after the fact.

Furthermore, Mr. Boudreau's conduct at the interview shows that he acted in a negligent manner in representing Mr. Ferguson with respect to the incident involving the \$200. There is conflicting evidence as to when Mr. Boudreau learned of the incident, but, although the Board is inclined to accept the complainant's version that he notified Messrs. LeBlanc and Boudreau of the incident prior to the interview, there is no reason to deal with the question here. Whether the Board accepts Mr. Boudreau's version of the incident or that of the complainant, its conclusion concerning Mr. Boudreau's conduct is the same. While it is true, as Mr. Boudreau said, that he learned of the incident at the time of the interview, he acted, to say the least, in an irresponsible manner by immediately asking Mr. Ferguson, in the employer's presence, if he was prepared to accept a punishment for having taken \$200, even before obtaining and checking the complainant's version and after discussing with him the repercussions of this situation on his employment. According to the complainant, Mr. Boudreau would have learned in the course of such a

verification that the practice of cashing cheques had been followed for a long time. He would also have learned that the complainant had cashed cheques on a number of occasions since taking up his duties, in particular in early 1996. Mr. Boudreau's attitude was tantamount to immediately convicting the complainant and making it difficult, if not impossible, to later defend the complainant's interests in this regard.

If, however, Mr. Boudreau was aware of the incident involving the \$200 prior to the interview, we can only conclude that his failure to investigate the matter at the appropriate time prevented him from representing the complainant adequately on that occasion for the aforementioned reasons. A thorough investigation would have enabled him to verify, at the appropriate time, the employer's claim that it knew nothing of the practice, which was moreover contrary to an employer directive, and the claim by the complainant, that he never interpreted the directive in the same manner as the employer.

In the circumstances, the Board finds that Mr. Boudreau did nothing before, during or after the disciplinary interview to ensure that the union represented the complainant in a manner consistent with the requirements of the Code. A minimum of judgment and prudence would have required that Mr. Boudreau obtain the complainant's full version prior to the interview.

The union's conduct after the interview and following the complainant's receipt of the notice of dismissal is an aggravating factor in this case. Before Mr. Ferguson was informed of his dismissal and of the employer's reasons, his union representative had reached an agreement with the employer as to his fate: the union representative would recommend that he resign, which is what Mr. Boudreau did immediately and urgently, suggesting that the complainant backdate his letter of resignation. Here too, the union accepted the employer's reasons without checking with the complainant to see whether they were valid. In the circumstances, the Board does not believe that the union acted

independently: it accepted the employer's claims without verifying them and based its decision solely on those elements.

As to the union's argument that the complainant's admission concerning the incident involving the \$200 was fatal and that the chances of the complainant's case succeeding at arbitration were virtually nonexistent because of the precedents in similar cases, the Board must find that the union provided no concrete example or cases in support of this claim, in spite of the fact that Mr. Boudreau and Ms. Anderson stated on a number of occasions that this element was a determining factor in their decision.

Furthermore, regarding Mr. Ferguson's "past history", which Ms. Anderson took into account in deciding to recommend that the complainant resign rather than file a grievance, the complainant rightly emphasized that the facts relating to that "past history" were never subject to disciplinary actions.

Lastly, the Board does not accept the union's argument that it did not refuse to file a grievance or refer it to arbitration, but rather recommended that the complainant resign, leaving the final decision up to him. A union's duty of fair representation is not limited to presenting and pursuing a grievance. To this extent, the union's decision to recommend that the complainant not file a grievance is a decision contemplated by section 37 of the Code since it affects the exercise of Mr. Ferguson's rights under the collective agreement. However, while it is technically correct that the union did not refuse to file a grievance, in practice, its recommendation in the circumstances in which it was made, that is to say requiring that the complainant make a decision very quickly without having the opportunity to make his views known or to try to convince the union it should file a grievance and take further action, showed that the union had already concluded that the complainant had stolen \$200 and that he had violated an employer directive. The union's conduct clearly indicated to the complainant that only one course of action was open to him, that is the one the union recommended: that he resign.

The union did not act in bad faith or in a discriminatory manner. However, its summary and expeditious approach to the complainant's case and the absence of a thorough investigation that would have enabled it to consider all relevant elements and to examine the employer's allegations in an informed way showed serious negligence that was tantamount to arbitrary conduct in contravention of the Code.

The complainant had an unblemished disciplinary record and was faced with the harshest possible disciplinary action: the loss of his employment. In the circumstances, the union should have considered Mr. Ferguson's case with particular attention and care. (See André Gingras, *supra*.)

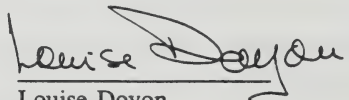
For these reasons, the Board finds that the union violated section 37 of the Code in its handling of Mr. Ferguson's dismissal case and allows the complaint.

CONSEQUENTLY, the Board orders that:

- . the union file a dismissal grievance on Mr. Ferguson's behalf and refer the grievance to arbitration;
- . the time limits applicable to the filing of a grievance and to its referral to arbitration be waived;
- . the union pay the legal fees and reasonable costs incurred by the complainant in appearing before the Board and those that will be incurred in the preparation and hearing of the grievance, should the complainant choose not to be represented by the counsel named by the union. In that case, the union shall cooperate with the complainant and his lawyer so that the grievance is heard as soon as possible.

The Board further orders that the union pay any compensation that the arbitrator may order for the period from the date of the complainant's dismissal until the date of this decision.

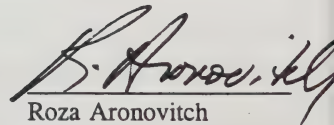
The Board appoints Ms. Suzanne Pichette, Regional Director and Registrar of the Montreal Regional Office, or any other person she may designate, to assist the parties in implementing this decision, if applicable. The Board will remain seized of any matter that may arise at that time.



Louise Doyon
Vice-Chair



Véronique L. Marleau
Member



Roza Aronovitch
Member

information

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Summary

Communications, Energy and Paperworkers Union of Canada, *complainant*, and Lethbridge Television, a Division of Westcom TV Group Ltd., Okanagan Valley Television (CHBC-TV), a Division of Westcom TV Group Ltd., CHEK-TV, a Division of Westcom TV Group Ltd., BCTV, a Division of Westcom TV Group Ltd., Calgary Television, a Division of Westcom TV Group Ltd., and Westcom TV Group Ltd., *respondents*.

Board File: 17395-C (745-5373)
CLRB/CCRT Decision no. 1214
December 3, 1997

The Communications, Energy and Paperworkers Union of Canada filed a complaint, pursuant to section 97 of the Code, against five television stations, which are divisions of WIC Television Ltd. The union holds separate bargaining certificates to represent employees at each of the television stations.

In anticipation of the latest round of negotiations, the union formed the "WIC Executive Council" which consisted of the Presidents of the five local unions, as well as the union's national representative, to essentially constitute a joint bargaining committee to negotiate collective agreements, on behalf of the union, at each individual television station.

The employers rejected the union's proposal for joint bargaining and refused to grant leave

Résumé

Syndicat canadien des communications, de l'énergie et du papier, *plaignant*, ainsi que Lethbridge Television, une division de Westcom TV Group Ltd., Okanagan Valley Television (CHBC-TV), une division de Westcom TV Group Ltd., CHEK-TV, une division de Westcom TV Group Ltd., BCTV, une division de Westcom TV Group Ltd., Calgary Television, une division de Westcom TV Group Ltd., et Westcom TV Group Ltd., *intimées*.

Dossier du Conseil: 17395-C (745-5373)
CLRB/CCRT Décision n° 1214
le 3 décembre 1997

Le Syndicat canadien des communications, de l'énergie et du papier a présenté, aux termes de l'article 97 du Code, une plainte contre cinq stations de télévision qui sont des divisions de WIC Television Ltd. Le syndicat détient des certificats d'accréditation distincts à titre d'agent négociateur des employés à chaque station de télévision.

En prévision de la dernière ronde de négociations, le syndicat a mis sur pied le «Conseil exécutif WIC» qui regroupait les présidents des cinq sections locales ainsi que le représentant national du syndicat pour constituer essentiellement un comité chargé de négocier des conventions collectives au nom du syndicat, à chaque station de télévision.

Les employeurs ont rejeté la proposition de négociation conjointe du syndicat et ont refusé

to the local presidents for the purpose of negotiating collective agreements at any station other than the station he/she represents.

The union filed an application alleging that the employers' refusal to allow the presidents to participate in joint negotiations of all five bargaining units violated section 94(1)(a) of the Code.

The Board dismissed the complaint and concluded that the rights embodied in section 94(1)(a) that protect "the representation of employees by a trade union" exist consequent upon certification or voluntary recognition and are attached to a particular unit either defined by the Board, or voluntarily recognized by the parties. It determined that section 94(1)(a) does not provide for employee representation rights outside the scope of the respective bargaining certificates.

d'accorder un congé aux présidents des sections locales pour négocier les conventions collectives à une station autre que celle que chacun représentait.

Le syndicat a présenté une demande alléguant que le refus des employeurs de permettre aux présidents de participer aux négociations conjointes des cinq unités violait l'alinéa 94(1)a) du Code.

Le Conseil a rejeté la plainte et a conclu que les droits garantis par l'alinéa 94(1)a) quant «la représentation des employés par un syndicat» existent par suite d'une accréditation ou d'une reconnaissance volontaire et visent une unité particulière définie par le Conseil ou volontairement reconnue par les parties. Il a également déterminé que l'alinéa 94(1)a) ne prévoit pas de droits de représentation des employés autres que ceux visés par les certificats d'accréditation respectifs.

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Canada
Labour
Relations
Board

Conseil
canadien des
relations du
travail

Reasons for decision

Communications, Energy and Paperworkers
Union of Canada,

complainant,

and

Lethbridge Television, a Division of Westcom
TV Group Ltd., Okanagan Valley Television
(CHBC-TV), a Division of Westcom TV Group
Ltd., CHEK-TV, a Division of Westcom TV
Group Ltd., BCTV, a Division of Westcom TV
Group Ltd., Calgary Television, a Division of
Westcom TV Group Ltd., and Westcom TV
Group Ltd.,

respondents.

Board File: 17395-C (745-5373)
CLRB/CCRT Decision no. 1214
December 5, 1997

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, as well as Mr. Patrick H. Shafer and Ms. Roza Aronovitch, Members.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The Communications, Energy and Paperworkers Union of Canada ("the Union") filed a complaint, pursuant to section 97 of the Code, against the following five television stations, which are all divisions of Westcom TV Group Ltd. - now WIC Television Ltd.: Okanagan Valley Television (CHBC-TV); CHEK-TV; BCTV; Lethbridge Television; and CICT Independent Calgary Television ("the Employers").

The Union holds separate bargaining certificates to represent employees at each of the named television stations. It alleged that the Employers' refusal to allow the local presidents - at each of the five stations - to sit at the bargaining table for all five units violates section 94(1)(a) of the Code.

On April 25, 1997, the Board informed the parties of its decision to dismiss the Union's complaint. The following are its reasons for doing so.

II

At the outset of the hearing, the parties submitted the following Agreed Statement of Facts:

"1. The Communication Energy and Paperworkers Union of Canada (CEP) has been found by the CLRB to be the successor bargaining agent to the National Association of Broadcasting Employees Technicians (NABET).

2. WIC Western International Communications Ltd. (WIC) is an integrated broadcast communication and entertainment company. One of its wholly owned subsidiaries is WIC Television Ltd.

3. The application and all correspondence to date refers to Westcom T.V. Group Ltd. as being a wholly owned subsidiary of WIC. Recently Westcom TV Group Ltd. changed its name to WIC Television Ltd. As such all references to Westcom TV Group Ltd. should be changed to WIC Television Ltd. and indeed the Certificates in question should be amended accordingly.

4. WIC Television Ltd. owns eight television stations in B.C., Alberta and Ontario. These are as follows:

- a) BCTV, a division of WIC Television Ltd. - Vancouver, B.C.*
- b) CHEK, a division of WIC Television Ltd. - Victoria, B.C.*
- c) Okanagan Valley Television Ltd. (CHBC), a division of WIC Television Ltd. - Kelowna, B.C.*
- d) Calgary Television Ltd., (CICT) a division of WIC Television Ltd. - Calgary, Alberta*

- e) Lethbridge Television Ltd., a division of WIC Television Ltd. - Lethbridge, Alberta*
- f) ITV, a division of WIC Television Ltd. - Edmonton, Alberta*
- g) RDTV, a division of WIC Television Ltd. - Red Deer, Alberta*
- h) CHCH TV, a division of WIC Television Ltd. - Hamilton, Ontario*

5. NABET, the predecessor union to the CEP, was certified for five of the above stations as follows:

- a) BCTV - originally certified in June of 1961.*
- b) CHEK TV - originally certified in June of 1965.*
- c) Okanagan Television - originally certified in February of 1982*
- d) Calgary Television - originally certified in December of 1974.*
- e) Lethbridge Television - originally certified in June of 1990.*

6. The employees of ITV, RDTV and CHCH are not represented by the CEP and those employees are not affected by this complaint.

7. WIC acquired the five stations in question at the following times:

a) BCTV and CHEK TV Ltd.

- 1963 - obtained an interest in BCTV and CHEK TV.*
- 1982 - acquires control.*
- 1989 - 100% ownership.*

b) Okanagan Valley Television Ltd.

- 1968 - acquires an interest through BCTV.*
- 1989 - 100% ownership.*

c) Calgary Television and Lethbridge Television

- 1989 - acquires 100% ownership in purchase from SELKIRK.*

8. The CEP holds separate certifications for each of the five broadcast enterprises involved in this application. Those Certificates have been provided to the Board.

9. Historically, NABET and the CEP have negotiated the renewals of the various Collective Agreements at the various locations separately. The history has been that a local negotiating committee is selected by the employees of each location and that a 'National

Representative' from NABET and now CEP would be assigned to assist in preparation for negotiations and would be the spokesperson for the Union.

10. There are separate Collective Agreements at each location and a copy of each of those agreements will be entered as exhibits at this hearing. The Collective Agreements are with the CEP.

11. In 1992/93, NABET proposed to WIC (Westcom TV Group Ltd.) that common or master or joint bargaining take place in relation to all five locations. This proposal was rejected by the employers and separate negotiations took place.

12. In January of 1996, the CEP proposed again to Westcom TV Group Ltd. (as it then was) a bargaining structure that would involve common or master bargaining at which the Union would be represented by the Presidents of each of the various CEP locals involved. This proposal was again rejected by the employer.

13. The CEP then indicated that it intended to have all of the members of the WIC Executive Council, the Presidents of the Locals, attend at each location for bargaining and that the members of each of the Locals of the CEP had approved of this method of bargaining.

14. By way of letter of March 14th, 1996, a copy of which will be entered, the Westcom and the various Employers responded to the CEP.

15. Notice to Bargain has been given at each of the five locations but negotiations have not commenced at any of those locations and are awaiting the outcome of this application."

The "WIC Executive Council" (paragraph 13 above) was created, via resolutions passed by each union local, specifically to bargain collectively with the Employers. It is composed of the local presidents and the Union's National Representative, Mr. Robert Lumgair. The Union described the Council's purpose as:

"a cooperative forum by which the different bargaining units may pursue the best interests of the members in cooperation with other WIC bargaining units."

In short, the WIC Executive Council is essentially a joint bargaining committee created to negotiate collective agreements for each individual television station.

On January 10, 1996, the Union proposed a round of negotiations, based on the joint bargaining committee structure, which would involve common union proposals for each collective agreement on the following issues: classification changes, uniform lay-off notices, training opportunities, personnel harassment policy, part-time work, language, wage increases and agreement on a common expiration date. The Union's witnesses testified that the proposed process would ensure more efficient negotiations and a uniform interpretation of the language and intent of the collective agreements.

In a joint response dated March 14, 1996, the Employers rejected the Union's proposal - and declined to participate in joint bargaining - in the following terms:

"As you are aware, sometime back you informed me of your proposed new bargaining structure (Wic Executive Council) for upcoming Wic negotiations at our respective stations.

We have now had the opportunity to examine in depth the language in each of five station collective agreements on 'Leave For Union Activities'. Following our review I must now inform you that the company has concluded that none of our stations are required or obligated in any way to provide a leave of absence to our respective union presidents for the purpose of negotiating collective agreements at other Wic stations. Consequently, each station will not grant such leave or enter into bargaining under the CEP's proposed new structure.

Each station will continue to negotiate in good faith with their respective local negotiating committees. The company will endeavour to resolve any issues that affect respective stations and their employees in their marketplace. As previously stated, the company has no interest in pursuing main table (master) bargaining. ..."

(emphasis added)

The Employers' response, particularly the portion emphasized above, gave rise to the Union's present complaint.

III

Much of the evidence adduced by the Union pertained to the Employers' corporate structure and their interrelationship as part of a common group of television stations. The Union took the position that the Employers' integrated operations, and increased centralization, justified the organization of its affairs to enable it to bargain on an equally common front. It submitted that "*there is really only one 'employer' in this situation and that is 'WIC TV Ltd.'*" and that its strategy to implement a centralized bargaining committee simply responds to the centralization of WIC's decision-making process. However, the Union neither filed an application for a single employer declaration, pursuant to section 35 of the Code, nor sought to have the bargaining unit structure amended.

The Employers denied that their operations were centrally directed, particularly with respect to collective bargaining. While admitting that managers of the various stations may at times consult on bargaining matters, they maintained that the ultimate bargaining decisions rested with the individual station level. Mr. James B. McDonald, President & CEO of WIC Television Ltd., indicated that the company was searching for a "balance" to preserve the autonomy of each station while, at the same time, taking advantage of the shared values, expertise and knowledge found at the five stations. According to him, the current management structure allowed for this type of symmetry. In McDonald's view, an appropriate description of WIC's structural organization would be that of a "diversified but unified company".

The history of collective bargaining between the parties referred to in paragraph 9 of the Agreed Statement of Facts was described in further detail by Robert Lumgair in

his testimony. It was established that bargaining with the Employers had become a protracted exercise at all the stations (he estimated between 14 and 16 months of negotiations). Each collective agreement has a different expiration date and, in recent years, no collective agreement has been concluded without the assistance of a mediator. In the Union's view, the bargaining format it proposed would dramatically improve this situation and labour relations between the parties. However, while apparently seeking the operational "balance" referred to by McDonald, the Employers opposed that concept in a labour relations context.

The evidence revealed that the day-to-day operations of each station are managed at the local level, that collective bargaining is conducted at the local level and that collective agreements are concluded for each station separately. There was other evidence relating to programming, resource sharing, accounting and management directed at revealing the commonality in the management and operation - as opposed to the autonomy - of the individual stations; this evidence, however, while germane to a section 35 application, is not relevant here.

Although the relevant collective agreements contain a provision dealing with employees' leave to participate in union activities, the Union submitted that individual grievances under the respective collective agreements would not provide the remedy sought before the Board. According to the Union's submissions, an arbitrator would not resolve the issue of whether the Employers' denial in these circumstances amounts to interference with the administration of the union and the representation of its members pursuant to section 94.

IV

The Union acknowledged that, in the absence of an agreement with the Employers, or a Board order consolidating the bargaining certificates, it must negotiate separate

collective agreements for each location. Nevertheless, the Union contended that it has a fundamental right to choose who will sit at the bargaining table, on its behalf, at each location. It argued that the employers' obligation to grant leave to those employees chosen to sit at the bargaining table is inextricably connected with the Union's prerogative - safeguarded by section 94 - to choose its representatives for collective bargaining.

The Employers did not contest the Union's right to bring whomever it wished to the bargaining table. They argued, however, that the Union, through the present complaint, was attempting to achieve a single bargaining structure for all five stations without reference to the requirements of an appropriate application filed pursuant to section 35 of the Code.

Furthermore, the Employers collectively took the position that they could not be forced to allow their employees to engage in collective bargaining with stations other than where those employees work; that is, to engage in bargaining with different employers. To do so, they submitted, would effectively ensure and compel joint bargaining. They argued that the Union could not require joint bargaining when it holds a separate bargaining certificate for each individual employer, and that the Union's attempt to force joint bargaining in itself constituted an unfair labour practice.

The Employers finally contended that the question of whether an employee is entitled to a leave of absence for bargaining with another employer must be determined by referring to the collective agreement in place between the union and that individual employer, and accordingly requested that the Board defer the matter to arbitration pursuant to section 98(3) of the Code.

V

At the hearing, the Board advised the parties that it would not embark, *proprio motu*, on a section 35 enquiry. It made clear that it would only consider a declaration under section 35 if one of the parties filed an application to that effect. The Union, in response, indicated, as reflected in its written submissions, that such an application was not before the Board.

Given that position, the remaining issue before us is whether the Employers, by refusing to grant leaves of absence to their employees to facilitate their participation in negotiations with other employers that are covered by different bargaining certificates, violated section 94(1)(a) of the Code. The application of section 98(3) of the Code will have to be considered in light of the answer to that question.

VI

The relevant provisions of the Code read as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

98. (3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

VII

A combination of sections 47, 48, 50 and 56 of the Code clearly established that a notice to bargain triggers the collective bargaining process for the purpose of concluding a single collective agreement for the bargaining unit defined by the Board: see Brink's Canada Limited (1994), 95 di 91 (CLRB no. 1083); Brink's Canada Limited (1993), 91 di 175 (CLRB no. 1005); Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726); Hémond v. Coopérative Fédérée du Québec, [1989] 2 S.C.R. 962. Neither of the parties disputed that the effect of a Board certification order presupposes that a single collective agreement must be negotiated for the bargaining unit described. The principle does not change where the parties involved, as is the case here, are named in multiple units with separate certification orders.

In the absence of a single employer declaration, pursuant to section 35 of the Code, the individual employer named on the bargaining certificate is the employer for all purposes of the Code - including a section 94 complaint. This principle is inextricably linked with the exclusive authority vested in a certified bargaining agent to negotiate on behalf of the employees in the bargaining unit pursuant to section 36(1)(a) of the Code. In the present case, given the existence of separate certification orders for each television station, it follows that the Union must negotiate a separate collective agreement that will cover the employees included in each of the bargaining units. Recently, in Canadian Broadcasting Corporation (1997), as yet unreported CLRB decision no. 1201, the Board made a similar observation in this regard:

"The Employer's assertions concerning the Joint Bargaining Agreement raise the serious question of the autonomy of a bargaining agent with respect to its choice of representative in negotiations, and with respect to its bargaining posture.

We would agree that the unions could not require the Employer to bargain with all three unions jointly in respect of each bargaining unit. That would be an abdication of each union's individual responsibility to bargain with the Employer in respect of the bargaining unit for which it is certified, and it would impose on the Employer a duty greater than that imposed by the Code, namely to bargain with the exclusive certified bargaining agent. Indeed, it would be an offence for the Employer to bargain with anyone other than the certified bargaining agent in respect of employees in any particular bargaining unit."

(pages 4-5)

Juxtaposed to the principle set out above is the equally clear concept that a bargaining agent has the right to choose whomever it pleases as its representative at the bargaining table. That point was reiterated by the Board in Canadian Broadcasting Corporation, supra:

"... either party may choose its own representative for bargaining purposes and may, subject to reasonable limitations, invite appropriate interested persons to be present during negotiations. ..."

(page 5; see also Canada Post Corporation (1989), 79 di 122; and 7 CLRBR (2d) 245 (CLRBR no. 772), pages 127; and 249-250; and Maritime Employers' Association (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRBR no. 540), pages 79-80; and 29-30)

When the Board issues a certification order, the employer is required by sections 50 and 94 to negotiate with the bargaining agent named therein and, "subject to reasonable limitations", to recognize the representatives chosen by the union to negotiate on behalf of the employees in the unit. Once a union chooses its bargaining representatives, does section 94(1)(a) create a concurrent obligation on the employer to provide a leave of absence from employment for those individual representatives, chosen by the union, to participate in collective bargaining?

The question must be examined with respect to two distinct situations: (1) Where a first collective agreement is to be negotiated, the section clearly imposes that obligation. Implicit in the right granted to the union to choose, within reasonable limits, its bargaining representatives to negotiate with the employer, is the concurrent obligation on the employer, in first contract situations, to recognize that choice and make those employees, employed within the unit, available as required. To conclude otherwise would essentially emasculate the union's prerogative of choice recognized by the Code as part of the collective bargaining process. (2) Where the negotiations involve a subsequent bargaining round, and the existing collective bargaining agreement contains provisions relating to leave for bargaining purposes, the extent of the employer's obligation to provide the leave of absence - and the union's means of enforcing this obligation - will be encompassed in the collective bargaining agreement itself.

The circumstances here present a hybrid of the above two situations. Here there are five distinct bargaining units with five different employers, each with a collective agreement in place. The employees of each employer are represented by a common union which is, for the first time, attempting to jointly bargain issues common to all employers. Does a bargaining agent's right to choose its representative, pursuant to section 94, create an obligation on an employer to allow its employees to participate in a joint negotiating committee with a view to representing the same union but in a different bargaining unit with a different employer?

Although complicated by the fact that the different employers appear to share a common management corporate structure within WIC TV, in the absence of a section 35 declaration, those facts do not change the reality that the Union, pursuant to five separate Board orders, represents employees of separate employers in five distinct bargaining units. The Union's argument to the contrary notwithstanding, the basic issue remains: can an employer who is a stranger to the bargaining relationship be

guilty of violating section 94(1)(a) for refusing to allow its employees to negotiate with another employer?

In CFTO-TV Limited (1995), 97 di 35; and 95 CLLC 220-045 (CLRB no. 1111), the Board described the purpose of section 94(1)(a) as follows:

"Parliament has used broad language in prohibiting employers or persons acting on their behalf from participating in, or interfering with, the formation or administration of a trade union or the representation of employees by a trade union. The purpose of section 94(1)(a), sometimes referred to by the Board as an 'omnibus provision', is twofold. First, section 94(1)(a) is designed to provide employees with broad protection from an employer's interference with their rights and freedoms recognized by section 8 of the Code.

...

...

This provision is also aimed at protecting the union which ought to be free from improper interference by the employer in determining the manner in which it will administer itself and represent the employees of the employer. For example, in Canada Post Corporation (772), supra, the Board had this to say:

'... section 94(1)(a) is directed at the protection of the entity rather than individual basic freedoms under section 8(1). These provisions do not contemplate that union administration or that the representation of employees by a trade union will be restricted to employees under the Code. The reality of the trade union movement is that a great number of union representatives are employees of the trade union rather than employees in bargaining units employed by employers under the Code. In this case we view Messrs. Metcalfe and Vandonk as elected union representatives of the trade union as an entity which is protected by section 94(1)(a) of the Code rather than employees who are exercising their rights and basic freedoms under section 8(1) to participate in the lawful activities of the trade union of their choice. It is not necessary to be employees to receive the protection offered trade union representation by section 94(1)(a).

...

(pages 127-128; and 250)"

(pages 59-60; and 143,398-143,399)

An employer's actions need not be motivated by anti-union animus for there to be a violation of section 94(1)(a). The Board applies a "balancing test" to determine whether an employer's conduct, which ostensibly interferes with the formation or administration of the union or its representation of employees, constitutes a breach of section 94. It first asks whether there is a lawful union activity protected by section 94(1)(a) and then examines whether a compelling business reason exists to counterbalance the employer's interference with the union's protected activity (see Canadian Broadcasting Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRBR no. 839), confirmed in Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157; and Island Tug & Barge Limited (1997), 35 CLRBR (2d) 214 (CLRBR no. 1198)).

Not all union activities, regardless of their merits, are protected by the broad parameters of section 94. The protection afforded by the section is aimed at rights recognized by the Code. The rights embodied in section 94(1)(a) which protect "*the representation of employees by a trade union*" - as distinct from its "formation or administration" - exist consequent upon certification or voluntary recognition and are attached to a particular unit defined by the Board or voluntarily recognized by the parties. In the present case, the application of section 94(1)(a) must be considered in light of the bargaining relationship established either by Board order or agreement of the parties. For the Union to find redress here, the rights sought to be protected must be linked to its bargaining relationship with the Employers.

The Union contended that the Employers breached section 94 by refusing to allow their employees to bargain with other employers. Given the existing bargaining structure and the parties' decision not to modify it, the "representational right" sought to be enforced by the Union is simply not guaranteed by section 94(1)(a) of the Code. In our view, a bargaining agent's right to represent the employees in its certified bargaining unit does not extend to requiring an employer to allow its employees to

negotiate with other employers. This is particularly so where each employer covered by the application has entered into a collective agreement with the Union, which provides for leaves of absence for the purposes of participating in appropriate union activities.

As stated earlier, a union may choose whom it wishes to represent the employees' interests at the bargaining table. This includes the right to choose persons who are not members of the bargaining unit or employees of the employer designated in the bargaining certificate (see Canada Post Corporation, *supra*). However, when non-employees are chosen, the question of whether they are in fact free to attend depends on their relationship with their own employer.

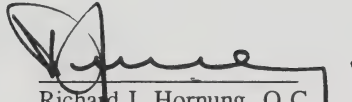
While the significant incidence of commonality between the various Employers, consequent upon their relationship with WIC TV, might have a bearing on a section 35 application, it cannot serve to displace the considerations applied in determining the section 94 complaint. Nor in the circumstances can the Union refuse to negotiate with the Employers until such time as the Employers allow the individuals requested to sit on the joint WIC Executive Council. Section 94(1)(a) cannot be used by the Union to create a *de facto* bargaining structure which - given the absence of agreement - might otherwise only be attained through an application pursuant to sections 18 and 35 of the Code. Labour boards have repeatedly found that a party that bargains to impasse in an attempt to force joint bargaining, where more than one bargaining certificate exists, violates the principles of good faith bargaining (Western Cablevision Ltd. et al. (1986), 65 di 150 (CLRB no. 573); Burns Meats Ltd., [1984] OLRB Rep. Aug. 1049; School District No. 44 (North Vancouver) (1992), 17 CLRBR (2d) 254 (B.C.)). Although not at issue in the present case, the above cases nevertheless demonstrate the importance of respecting the bargaining structure defined in the bargaining certificates issued by the Board.

Section 94(1)(a) does not provide for employee representation rights outside the scope of the respective bargaining certificates. Given the absence of a consolidated bargaining structure for all five stations, the Employers' refusal to grant leave to the local presidents to negotiate with the other Employers does not, in the circumstances, amount to a violation of section 94(1)(a). The Board therefore finds that the Employers did not violate section 94 of the Code in refusing to allow the local union presidents of each station to negotiate with other employers on behalf of employees who are outside the scope of their respective bargaining units.

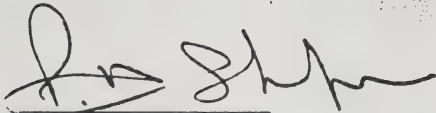
VIII

Each of the collective agreements in place contain provisions dealing with leaves of absence for union activities as well as general provisions on anti-union discrimination. Generally speaking, all of the criteria set out in Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97), which would induce the Board to exercise its discretion and refer the matter to arbitration, are present in this case. Given the absence of a single employer declaration, and the Board's finding that the Employers did not violate section 94(1)(a), there is no need to rule on the application of section 98(3) of the Code. However, in light of the provisions of the collective agreements, and our determination herein, the question of whether the employees have a right to be released from work is a matter to be determined at arbitration, pursuant to the terms of each collective agreement.


For all the foregoing reasons, the Union's complaint is dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



Patrick H. Shafer
Member



Roza Aronovitch
Member

information

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Summary

Maritime Employers Association, *applicant*,
and Quebec Ports Terminals Inc., *employer*.

Board File: 17757 (553-9)
CCRT/CLRB Decision no. 1215
December 12, 1997

This decision deals with an application filed pursuant to section 34 of the Code by the Maritime Employers Association (MEA) in its capacity of appointed employer representative for the Port of Trois-Rivières/Bécancour.

The Board must determine whether the MEA is authorized, under section 34(5) of the Code, to require that individual employers, that are bound by the collective agreement, assume responsibility for financial obligations resulting from their violations of the collective agreement. The Board must also determine whether, as a result, the MEA is entitled to claim from Quebec Ports Terminals Inc. (QPT) reimbursement for money paid to employees, in its capacity of employer representative, following violations of the collective agreement.

QPT acknowledged that the MEA could require an individual employer to pay the costs resulting from its violation of the collective agreement. In this case, however, QPT considered that it would not be appropriate for the Board to intervene, as the MEA allegedly agreed via a transaction to assume responsibility for the money it is claiming from QPT.

Résumé

Association des employeurs maritimes, *requérante*, et Terminaux Portuaires du Québec Inc., *employeur*.

Dossier du Conseil: 17757 (553-9)
CCRT/CLRB Décision n° 1215
le 12 décembre 1997

Les présents motifs portent sur une demande fondée sur l'article 34 du Code et présentée par l'Association des employeurs maritimes (l'AEM) qui est le représentant patronal désigné pour le port de Trois-Rivières/Bécancour.

Le Conseil doit déterminer si l'AEM, aux termes du paragraphe 34(5) du Code, a le pouvoir d'exiger que les employeurs individuels qui sont liés par la convention collective assument les obligations financières qui découlent de leurs propres violations de la convention collective. Le Conseil doit aussi déterminer si, par conséquent, l'AEM a le pouvoir de réclamer à Terminaux Portuaires du Québec (TPQ) le remboursement des sommes qu'elle a, à titre de représentant patronal, versées aux employés à la suite de telles violations de la convention collective.

TPQ reconnaît que l'AEM peut imposer à un employeur individuel l'obligation de payer les coûts engendrés par sa violation de la convention collective. En l'espèce toutefois, TPQ considère qu'il serait inopportun pour le Conseil d'intervenir afin de trancher le présent litige puisque l'AEM s'est engagée au moyen d'une transaction à assumer les sommes qu'elle réclame à TPQ.

The Board granted the MEA's application. QPT has not established that there was a transaction by which the MEA would have agreed to pay the costs resulting from QPT's violation of the collective agreement. The MEA could determine that individual employers must assume responsibility for financial obligations resulting from their violations of the collective agreement. The Board further determined that it was appropriate to intervene in order to settle this dispute, which has a direct impact on the orderly operation of the geographic certification system in the Port of Trois-Rivières/Bécancour.

Pursuant to the remedial powers conferred by the Code, the Board ordered QPT to reimburse the MEA for money paid to the longshoremen in its capacity of employer representative.

Le Conseil a fait droit à la demande de l'AEM. TPQ n'a pas fait la preuve de l'existence d'une transaction par laquelle l'AEM se serait engagée à payer les coûts engendrés par la violation de la convention collective par TPQ. L'AEM pouvait décider que les employeurs individuels doivent assumer les obligations financières découlant de leurs violations de la convention collective. Le Conseil a déterminé qu'il y avait lieu d'intervenir pour trancher ce litige qui a un impact direct sur le bon fonctionnement du régime de l'accréditation géographique dans le port de Trois-Rivières/Bécancour.

En vertu des pouvoirs réparateurs qui lui sont conférés, le Conseil a ordonné à TPQ de rembourser à l'AEM les sommes qu'elle a dû payer aux débardeurs à titre de représentant patronal.

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Reasons for decision

Maritime Employers Association,

applicant,

and

Quebec Ports Terminals Inc.,

employer.

Board File: 17757 (553-9)
CCRT/CLRB Decision no. 1215
December 12, 1997

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Sarah E. FitzGerald and Ms. Roza Aronovitch, Members. Hearings were held at Montréal on March 13 and 14 and October 27, 28 and 29, 1997.

Appearances

Ms. Manon Savard, accompanied by Mr. Jean Bédard and Ms. Lyne Perron, for the Maritime Employers Association;

Mr. André Sasseville, accompanied by Mr. Jean Gaudreau and Captain Claude Desgagnés, for Quebec Ports Terminals Inc.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Application

The Maritime Employers Association (hereinafter "the MEA") is asking the Board to exercise its jurisdiction under sections 34(7) and 21 of the Code and to declare that Quebec Ports Terminals Inc. (hereinafter "QPT") is responsible for paying the money owed to certain longshoremen pursuant to the arbitral award issued by Mr. Claude H.

Foisy on October 25, 1993. The arbitrator found that QPT had violated the collective agreement, and allowed the grievances filed by the Syndicat des débardeurs, CUPE (hereinafter "the union"). The MEA is therefore asking the Board to order QPT to reimburse the \$4,538.34 it paid as employer representative pursuant to that arbitral award.

QPT's refusal to pay the money gave rise to these proceedings, which deal with the employer representative's power to require an employer to assume ultimate responsibility for financial obligations resulting from the application of the collective agreement.

As the MEA sees it, the matter at issue is raised in the context of the application of section 34 of the Code, and the Board has the necessary jurisdiction under section 34(7) to deal with it and make a payment order against QPT.

Section 34 reads as follows:

"34. (1) Where employees are employed in

(a) the long-shoring industry, or

(b) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board, the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(b) shall be made by the Board unless, on inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,

(a) require the employers of the employees in the bargaining unit

(i) to jointly choose a representative, and

(ii) to inform the Board of their choice within the time period specified by the Board; and

(b) appoint the representative so chosen as the employer representative for those employers.

(4) Where the employers fail to comply with an order made under paragraph (3)(a), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.

(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."

QPT argues that it is not responsible for paying the sums in question because the arbitral award ordered the MEA by name, and not QPT, to pay that money to the longshoremen. In the alternative, QPT argues that the MEA's application is unfounded

because of an intervening "transaction" or agreement which has the authority of a final judgment that makes the MEA responsible for paying the sums in question.

According to QPT, the "transaction" resulted from the combination of three things: first, the statements allegedly made by counsel for the MEA and counsel for the union before the Federal Court of Appeal on October 7, 1993, while an application to stay a Board decision was being heard, indicating that QPT was bound by the collective agreement on which the grievances were based; second, the February 23, 1994 agreement by which the MEA and the union agreed to ask the arbitrator to amend the payment order under the original arbitral award to replace QPT's name with that of the MEA; and finally, QPT's discontinuance of its motion in evocation against the original arbitral award after the aforementioned agreement was reached. We will come back to these three items.

Finally, QPT argues that the Board does not have jurisdiction to deal with this application because the Board's decision would have the effect of changing the operative part of the arbitral award ordering the MEA to pay the money claimed, which made the MEA the debtor of the obligations resulting from that award. QPT further argues that it was neither a party to nor present at the arbitration and that it is not bound by the arbitral award.

II

Background to this Decision

On June 12, 1992, the Board granted the union a multi-employer certification to represent employees involved in loading, unloading and related longshoring work at the port of Trois-Rivières/Bécancour.

On October 30, 1992, the Board appointed the MEA to represent the employers of those employees after the employers failed to agree on the appointment of an employer representative. A good summary of the situation that existed when the union was certified and the employer representative was appointed can be found in Quebec Ports Terminals Inc. et al. (1992), 89 di 153; and 93 CLLC 16,035 (CLRB no. 967). QPT applied for judicial review of that decision on the ground that the Board had misapplied and misinterpreted section 34 of the Code when it appointed the MEA. The Federal Court of Appeal dismissed that application on October 30, 1994.

On December 8, 1992, the MEA and the union signed a collective agreement that was in force until December 31, 1994.

Between December 23, 1992 and February 16, 1993, the union filed seven grievances with the MEA alleging that QPT had violated provisions of the collective agreement by refusing to pay for travel time contrary to clause 9.10, the four extra hours of work granted under clause 14.03 and the bulk cargo bonus provided for in clause 23.01 and Schedule C of the agreement.

According to the grievance procedure set out in article 5 of the collective agreement, the employer concerned or the MEA must first be notified orally of any complaint relating to the interpretation or application of the collective agreement. If the dispute is not resolved at that stage, the union may file a grievance with the MEA. The parties to the collective agreement, namely the MEA and the union, must then meet to discuss the grievances filed the previous week and attempt to settle them. A grievance may be discussed at three consecutive meetings, after which, if it has not been settled, automatically becomes void unless it is referred to arbitration by the union or the MEA.

After receiving the grievances, the MEA asked QPT to state its position on their merits. An exchange of correspondence followed. While QPT did not deny that the

facts were true, it felt that it was not bound by the provisions of the collective agreement on which the union was basing its demands. QPT claimed that it had never authorized the MEA to negotiate those provisions and include them in the collective agreement. It therefore felt that it did not have to pay the amount claimed and that the MEA had to bear all the financial and other consequences resulting for those provisions.

The MEA repeated its request to QPT concerning the merits of the grievances, noting that QPT's argument was not a valid defence at arbitration, that at first glance the MEA considered the grievances well founded and that QPT was responsible for making the payment claimed.

On March 18, 1993, since the MEA had not received any further information from QPT regarding the merits of the grievances, it told QPT that it was referring them to arbitration.

On April 14, 1993, the MEA asked the Board to intervene pursuant to section 65 of the Code and to rule on the existence of the December 1992 collective agreement. The hearing into the grievances was suspended.

On August 16, 1993, the Board held that the collective agreement complied with the definition in the Code and had been lawfully entered into by the appointed employer representative and the certified union. It also declared that the collective agreement bound not only the signatories but also all employees in the bargaining unit and all of their employers, regardless of their individual wishes. The Board referred the grievances in question back to the arbitrator so that he could decide the matter on the merits. (See Maritime Employers' Association (1993), 92 di 135; and 94 CLLC 16,027 (CLRB no. 1027).)

On August 24, 1993, the MEA, seeking to ensure that it could present a full and complete defence, again asked QPT whether it had any arguments to make on the merits of the grievances other than the ones the Board had rejected. On August 31, QPT responded by requesting that the hearing into the grievances be suspended because it had filed an application for judicial review of Board decision dated August 16.

On September 10, 1993, the MEA informed QPT of the date and place of the hearing into the grievances. The place was changed, and the MEA informed QPT of this on October 7, 1993.

In the interim, on September 28, 1993, QPT had applied to stay the aforementioned Board decision and the hearing into the grievances. On October 4, 1993, the Federal Court of Appeal dismissed that application in the following terms:

"The Court has serious doubts about the advisability and even the possibility of staying the execution of an order that is, on its face, essentially declaratory; in any event, the applicant has not shown that it would suffer irreparable harm if the impugned order continued to have effect during the proceedings; the balance of convenience is also clearly in the respondents' favour; the application to stay is therefore dismissed."

(translation)

It was when that application to stay was made that Mr. Gérard Rochon, representing the MEA, and Mr. Yves Morin, representing the union, allegedly made the statements that QPT considers to be the first component of the "transaction" pursuant to which the MEA allegedly agreed to pay any money owed as a result of QPT's violations of the collective agreement.

According to Mr. Jean Gaudreau, QPT's legal counsel, Mr. Rochon added the following after telling the Court that the MEA was the employer representative and

the party to the collective agreement that was dealing with the union: "but what is QPT complaining about today — it won't suffer any harm, the grievances affect my client, they affect us, we're the ones responsible for them" (Mr. Gaudreau's testimony, transcript of October 27, 1997, page 221; translation). Mr. Morin allegedly assented to those statements. Mr. Gaudreau's testimony is along the same lines as QPT's written reply to this application dated December 16, 1996.

On October 8, 1993, the MEA and QPT appeared before the arbitrator, who heard the evidence and issued an award on October 25, 1993. In that award, the arbitrator found that QPT had violated provisions of the collective agreement, and he ordered QPT to pay the longshoremen concerned the money owed as a result of the violations. QPT filed a motion in evocation against that arbitral award asking the Court to declare that the award was invalid and unenforceable. According to QPT, the arbitral award did not reflect what counsel had stated before the Federal Court of Appeal, since the payment order made as a result of QPT's violations of the collective agreement was made against QPT and not the MEA. The motion in evocation was supported by a sworn statement by Mr. Gaudreau dated November 8, 1993.

In his statement, Mr. Gaudreau declared that Mr. Rochon had told the Court that "the grievances were directed against the MEA" (translation), while Mr. Morin had said that "the grievances were directed against the MEA, and CUPE was seeking an award against the MEA" (translation). That sworn statement did not say that Mr. Rochon had agreed on MEA's behalf to "assume responsibility for" the grievances, that is, to pay for them.

In his testimony, Mr. Morin said that none of the counsel had told the Court that the MEA was responsible for paying any award made pursuant to the grievances. Mr. Morin said that Mr. Gaudreau's sworn statement, unlike his testimony in these proceedings and QPT's written reply, gave a correct and complete account of what Mr. Morin and Mr. Rochon had told the Federal Court of Appeal.

On February 23, 1994, two days before the motion in evocation was to be heard by the Superior Court, the union and the MEA reached an agreement. According to QPT, that agreement is the second component of the alleged "transaction."

The agreement provided as follows:

"WHEREAS the parties appeared before the arbitrator, Mr. Claude Foisy, on October 8, 1993 for the hearing of grievances 5, 6, 7, 8, 9, 12, 19 and 22;

WHEREAS in his award of October 25, 1993, the arbitrator declared that the collective agreement had been violated and ordered Quebec Ports Terminals Inc. to pay the amounts indicated therein;

WHEREAS the parties agree that the arbitrator should amend the payment order to replace Quebec Ports Terminals' name with that of the Maritime Employers Association;

THE PARTIES HEREBY AGREE THAT:

- 1. The preamble shall form an integral part of this agreement;*
- 2. The Syndicat des débardeurs, CUPE Local 1375, shall withdraw the payment order made against Quebec Ports Terminals;*
- 3. The parties shall request the arbitrator, Mr. Claude Foisy, to issue an award based on the preamble hereto;*
- 4. This agreement shall constitute a transaction within the meaning of the Civil Code."*

(translation)

This agreement was reached on counsel for the union's initiative. Mr. Morin explained to the Board that after reading the motion in evocation, he concluded that QPT recognized for the first time that the employer representative is the one that must, in relation to the certified union, assume the duties and responsibilities of an

employer, including those arising under an arbitral award. In this regard, it is helpful to reproduce the relevant paragraphs of QPT's motion:

"32. This provision [i.e. section 34(5) of the Code] clearly establishes that the MEA and not the applicant must, in relation to the certified union, assume the duties and responsibilities of an employer, including those arising under an arbitral award resulting from a grievance filed under a collective agreement entered into by that employer representative.

33. The respondent arbitrator exceeded his jurisdiction by finding that a person other than the one identified by Parliament and appointed by the Canada Labour Relations Board had to assume, in relation to CUPE, the duties and responsibilities resulting from the grievances filed under the collective agreement (Exhibit R-5), which the applicant never signed."

(translation)

According to the union, not only were QPT's comments consistent with its own interpretation, which was that the appointed employer representative is the spokesperson with which the union must deal, but they were also made when QPT was contesting, through another application for judicial review, the order appointing the MEA as the employer representative and the existence of the collective agreement signed by that representative.

In the circumstances, the union believed that the payment order made against QPT in the arbitral award therefore had to be amended and, insofar as the union was concerned, directed against its counterpart, the employer representative. It was in this context that the union and the MEA reached the February 23, 1994 agreement by which the union withdrew the payment order made in its favour against QPT and the parties requested the arbitrator to substitute the MEA for QPT.

Mr. Morin, who was not contradicted on this point, said that QPT was neither consulted about nor involved in the discussions that led to that agreement, nor did it sign the agreement.

Once the agreement was reached, Mr. Morin contacted counsel for QPT and sent him a copy. Mr. Morin had no further contact with counsel for QPT except on February 24, when that counsel informed Mr. Morin and Mr. Rochon that his client was discontinuing its motion in evocation, which it formally did in the following days. The MEA and the union intervened in the discontinuance proceedings and agreed that the discontinuance should occur without costs. The discontinuance is the third component of the alleged "transaction."

Further to the February 23, 1994 agreement, the arbitrator amended his original award and the payment order by substituting the MEA's name for that of QPT, but he maintained his findings about QPT's violation of provisions of the collective agreement and about the amount owed.

On April 6, 1994, the MEA sent QPT the amended arbitral award, requesting that it pay the money owed to the longshoremen. On April 12, 1994, QPT notified the MEA that it was refusing to pay the money because the arbitral award had ordered the MEA to pay amounts "based on the provisions of the collective agreement entered into by the MEA without Quebec Ports Terminals' authorization and despite its opposition" (translation) and the MEA alone had to bear "the consequences of those unauthorized acts" (translation). QPT reiterated its initial argument, which the Federal Court of Appeal had not yet dismissed. QPT did not, however, base its refusal to pay on the existence of a "transaction" with the MEA.

The MEA did nothing about this additional refusal by QPT, since in the meantime it had agreed with the union that the latter would not seek to enforce the arbitral award until QPT's two applications for judicial review had been decided. On October 30,

1994, the Federal Court of Appeal affirmed the Board's decision appointing the MEA as the employer representative and its decision declaring that the collective agreement existed and bound all employers and employees concerned (Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), [1995] 1 F.C. 459 (C.A.)). On April 6, 1995, the Supreme Court of Canada dismissed QPT's application for leave to appeal that judgment.

It was in this context that, on May 24, 1995, the MEA requested payment from QPT again, arguing that the Board decisions that QPT was challenging were now final.

On June 19, 1995, a new debate began concerning QPT's obligation to pay the money in question, this time on the basis that a "transaction" had been entered into by the MEA and the union on February 23, 1994, in return for which QPT had discontinued its motion in evocation. In QPT's view, that "transaction" had the authority of a final judgement between it and the MEA, which therefore had to pay the amounts determined by the arbitrator.

The MEA submits that it is "ridiculous" to argue that there was a "transaction" that made it responsible for payments owing to the longshoremen as a result of QPT's violations of the collective agreement. According to the MEA, that would have meant that it had agreed to use the contributions paid by the other employers at the port of Trois-Rivières/Bécancour for this purpose, while QPT was refusing to pay any contributions. (It should be noted that on June 1, 1995, in Quebec Ports Terminals Inc. (1995), 98 di 33; and 96 CLLC 220-005 (CLRb no. 1124), the Board found that the employer representative had the power to require employers to pay a reasonable share of the costs incurred in administering the system under section 34, which QPT was refusing to do. On July 11, 1995, the date of the MEA's reply, QPT was still standing by its refusal and had applied for judicial review of that Board decision.)

At that time, the MEA reminded QPT of the existing practice relating to the responsibility of the MEA and individual employers for the payment of the grievances: after the collective agreement was signed, the MEA paid for grievances concerning manpower dispatching, since it was responsible for compliance with these provisions of the collective agreement, while grievances alleging violation of the collective agreement by individual employers were paid for by those employers if such grievances proved to be founded. QPT had itself paid for grievances arising out of the violation of provisions of the collective agreement whose validity it did not dispute.

Nothing more happened until February 6, 1996, when the union formally requested that the MEA take the necessary steps to ensure that the money owed to the longshoremen was paid.

On February 15, 1996, the MEA responded and notified QPT that, given its refusal to pay the longshoremen, the MEA would pay the money owed but would reserve the right to seek reimbursement of the money paid to settle the grievances from QPT.

On February 29, 1996, the MEA informed the other employers at the port of Trois-Rivières/Bécancour that the money needed to settle the grievances involving QPT would be taken out of the port's operating budget and would subsequently be claimed from QPT. The payments were made by the MEA on March 9, 1996 out of the contributions paid by all employers at the port of Trois-Rivières/Bécancour.

On October 16, 1996, the payment of the grievances involving QPT was discussed at a meeting of the advisory committee of the port of Trois-Rivières/Bécancour, which is made up of the employers working at that port.

QPT's representative, Mr. Gaudreau, reiterated that QPT was still refusing to pay for grievances relating to articles of the collective agreement with which it had disagreed when the agreement was signed. QPT was thus restating an argument that had been

dismissed by the Federal Court of Appeal and the Supreme Court of Canada over a year earlier. QPT also told the other employers that, in its view, the MEA had assumed responsibility not only for the grievances covered by the arbitral award when the "transaction" was entered into by the MEA and CUPE, but also for all pending grievances involving QPT, that is, about 300 grievances totalling between \$280,000 and \$300,000. This was the first time that QPT had argued that the MEA had agreed to pay for all grievances involving QPT.

The other employers at the meeting decided that they would not be responsible for paying for the grievances involving QPT, and they asked that the MEA verify QPT's claims about the existence and scope of the alleged "transaction."

On November 7, 1996, in a letter to Logistec, the MEA restated the position it had expressed in its letter of February 29, 1996 with respect to responsibility for paying for grievances:

"To begin with, it seems clear to me that ultimate responsibility for paying for a grievance must be borne by the employer involved in the incident.

However, the collective agreement makes the MEA (and hence the employers) initially responsible if an employer does not properly fulfil the terms of the agreement.

That is why I notified the employers on October 16 that they might initially have to pay for certain grievances for which no defence could be made, even if this meant subsequently seeking reimbursement from Quebec Ports Terminals Inc."

(translation)

The MEA stated the following about the existence of a "transaction":

"It must be stated first of all that there is no transaction between QPT and the MEA that could make the MEA accept ultimate

responsibility for paying for grievances, be they specific grievances or grievances in general.

The document to which QPT referred, a copy of which is enclosed, merely reflects the content of the collective agreement, in that the MEA, as the representative under the collective agreement, had to accept initial responsibility for grievances arising under that agreement.

In no way can the said document be considered a 'transaction' in the sense meant by Quebec Ports Terminals Inc., let alone an acceptance of ultimate financial responsibility for any breach of the collective agreement by Quebec Ports Terminals Inc."

(translation)

On November 18, 1996, the MEA filed this application with the Board.

III

Decision

The reasons behind QPT's claim that the MEA had to pay the money owed to the longshoremen have changed since 1992. At all times, however, the issue has been the nature and scope of the employer representative's powers in administering a geographic certification under section 34, inter alia the power to require employers to assume responsibility for and thus to pay the costs resulting from their violations of the collective agreement. It was on the basis of this definition of the parties' disagreement that the evidence was adduced and heard.

During his oral argument, however, counsel for QPT agreed that it had been established that the collective agreement applied to QPT and that the MEA could require an employer to pay any costs resulting from its violation of that agreement. In QPT's view, however, that is not what is at issue. Rather, the question to be determined is whether it is appropriate for the Board to decide if the MEA or QPT

must pay the money in question, having regard, inter alia, to the existence of a "transaction."

While the Board takes note of QPT's admissions, it feels that they add nothing to the settlement of the dispute. They deal with questions that have been determined by the Board and affirmed by the Federal Court of Appeal and the Supreme Court of Canada, questions relating both to the existence and effect of the collective agreement and to the nature and scope of the employer representative's powers in administering the geographic certification system, including the power to interpret and apply the collective agreement.

In Quebec Ports Terminals Inc. et al. (1994), 94 di 191 (CLRB no. 1076), affirmed by the Federal Court of Appeal on January 31, 1996, the Board again referred to the employer representative's obligations and powers:

"... Once the collective agreement is signed, it must be administered, and hence interpreted and applied, in accordance with the agreements reached at the bargaining table. Did Parliament foresee that disputes might arise between the employer representative and the individual employers? The Board believes that it did, because this aspect of the collective labour relationship is at the heart of the system (see Maritime Employers' Association (1027), supra). The employer counterpart of the certified association is the employer representative, and vice versa: there is only one spokesperson for each side. This principle is the cornerstone of the system of geographic, industry-wide representation established by section 34; its objective is to promote harmonious and stable labour relations, which are the foundation of industrial peace, the ultimate objective. ..."

(pages 206-207)

The Board continued as follows:

"... It therefore seems essential to declare that an individual employer is bound by the interpretation that the employer representative gives to the agreement. If, for any reason, a dispute arises between employers, this dispute must be settled by the employer representative, and its decision will bind the employer in its relations with the union, and all individual employers associated under section 34. All this, of course, is subject to the obligations imposed by section 34(6)."

(page 209)

The Board stated the following about its power to intervene in a case involving an employer dispute or disagreement about the interpretation or application of the collective agreement:

"... It would be difficult, given this context, not to view section 34(7) as the expression of Parliament's intent to introduce a mechanism designed to ensure not only the implementation, but also the proper functioning, of the system and to give the Board responsibility for settling all problems that could hold it in check.

There are many questions that the application of such a system can raise. These difficulties include the differences of opinion, and ultimately the disputes, over the actual appointment of a representative, and those that may arise in the relations between employers and employer representative, the outcome of which will affect the application of section 34. They also include questions relating to the nature and scope of the rights and obligations of the various players, be it the role of the employer representative and the employers in interpreting and applying the collective agreement, or the rules governing the internal operation of the employer association, insofar as these rules affect collective labour relations. These questions not only are very specialized, but also directly affect the reputation, integrity and viability of the system and the effectiveness of certification orders issued under section 34. These are obviously questions that are determined on a case-by-case basis, having regard to the practical consequences they entail."

(page 206)

The Board therefore has the necessary jurisdiction under section 34(7) to settle the dispute that opposes QPT and the MEA. The matter at issue deals with the implementation of the geographic certification system under section 34, since it concerns the powers and obligations of the employer representative and the employers in interpreting and applying the collective agreement.

In fulfilling its mandate as employer representative, the MEA decided that individual employers are responsible for the costs resulting from their violations of the collective agreement. According to the MEA, this approach ensures that the sums paid by the employers to fund the certification system are fairly apportioned and used. This approach is also consistent with the practice recognized and applied by all employers, including QPT, which has paid for such grievances in the past.

In this case, the MEA decided that QPT bore ultimate responsibility for the costs resulting from its decision not to apply the collective agreement and accordingly had to reimburse the money paid to the longshoremen pursuant to the arbitral award confirming that QPT had violated that agreement. In light of QPT's general refusal to assume any financial responsibility for its violation of the collective agreement's provisions, the MEA had no choice but to ask the Board to intervene and determine whether the employer representative is authorized to act as it did in the circumstances.

The MEA's decision is one that the MEA had the power to make in discharging its duties as the employer representative under section 34(5), since it affects the effective application of the collective agreement binding on QPT. It involves "a labour relations question that pertains to the interpretation, application and administration of the system of collective labour relations in the longshoring industry" (see Quebec Ports Terminals Inc. et al. (1076), supra, page 208). The Board should therefore settle the dispute, which has a direct impact on the proper functioning of the geographic certification system at the port of Trois-Rivières/Bécancour.

As we have already noted, QPT argued that it would be inappropriate for the Board to intervene in this case, inter alia because a "transaction" had been entered into. QPT also argued that by intervening, the Board would be changing the final award by arbitrator Foisy, and determining the question of the unenforceability of the arbitral award against QPT, which it does not have the power to do. Before considering the validity of these arguments, the Board would like to note that, by presenting the question of the Board's intervention in terms of appropriateness, QPT is admitting that the Board has the necessary jurisdiction to settle this dispute, based, of course, on the relevant facts.

It should be specified from the outset that the Board's intervention in this case would not, as QPT argued, mean that it would be substituting itself for the grievance arbitrator or interpreting or changing the arbitral award. The question that the Board must determine is not which party is responsible under the collective agreement or an arbitral award for the costs resulting from violations of the collective agreement by individual employers, but whether the MEA, as the employer representative, is authorized to seek from those employers reimbursement for the money it has had to pay employees to settle grievances or implement an arbitral award. In this case, the arbitrator found that QPT had violated the collective agreement, determined the amount owed to the longshoremen and ordered the employer representative, which had signed the collective agreement, to pay that money to the employees in question, since the MEA is its counterpart, in relation to the certified union, and the only employer spokesperson. (See Quebec Ports Terminals Inc. et al. (1076), supra.)

The arbitral award was a final settlement of the grievances and of the question they raised about the interpretation and application of the collective agreement. It did no more nor less than resolve the dispute between the parties to the collective agreement: the MEA complied by paying the money claimed, and the union did not have to enforce the award.

However, the arbitral award did not settle the current employer dispute that arose as soon as the MEA insisted that QPT pay for its own violations of the collective agreement, that is, when the grievances were filed. That dispute continued after the award was issued, since the settlement of the dispute, which pertains to the administration and method of implementing the geographic certification system provided for in section 34 in terms of the respective liability of individual employers and the MEA, is the exclusive prerogative of the employer representative, which is responsible for managing the system provided that it complies with section 34(6) of the Code. (See Quebec Ports Terminals Inc. et al. (1076) and Quebec Ports Terminals Inc. (1124), supra, affirmed by the Federal Court of Appeal on March 22, 1996, leave to appeal to the Supreme Court of Canada refused on September 26, 1996.) To this extent, the Board's intervention is not intended to interpret or change the arbitral award, nor is that its effect; its only purpose is to determine whether the MEA could make the decision it made about QPT before and after the arbitral award.

There is no disagreement here between the parties to the collective agreement about the application and interpretation of the collective agreement, and grievance arbitration is therefore not the proper way to resolve the matter. The approach to this question taken by the Board in Quebec Ports Terminals Inc. et al. (1076), supra, is applicable here. (See page 208.)

The question about the legality of the arbitral award raised by QPT, which argued that the arbitrator's findings are not enforceable because it was not a party to the grievances and was neither a party to nor present at the arbitration, is not a question the Board must determine. In this regard, and subject to what was stated above about the powers of the employer representative, it need only be said that the MEA advised QPT of the date and place of the hearing into the grievances and that QPT always refused to inform MEA of its position concerning the merits of the grievances, merely stating that it was not bound by the collective agreement. The employer representative

always refused to accept that argument, and rightly so, as the judgments of the Federal Court of Appeal and the Supreme Court of Canada later confirmed.

However, if QPT believed that the employer representative did not represent it properly or behaved badly towards it during the events in issue here, it could have asked the Board to examine the question under section 34(6) of the Code, which it did not do. Instead, it refused to act on the MEA's numerous requests for reimbursement and it denied its financial responsibility arising out of the grievances decided by arbitrator Foisy, and all other pending grievances on the basis of the "transaction" entered into by the MEA and CUPE. (See Quebec Ports Terminals Inc. (1124), supra, pages 53-54; and 143,056)

The remaining question is whether, as QPT argued, the MEA agreed, through a "transaction" having the authority of a final judgment, to pay the cost of violations of the collective agreement by this particular employer.

QPT has not proved that such a "transaction" existed.

The Board does not accept Mr. Gaudreau's testimony that Mr. Rochon told the Federal Court of Appeal that the MEA would pay for the grievances in question. Both Mr. Morin's testimony and the content of the sworn statement signed by Mr. Gaudreau just a few days after the Federal Court hearing during which Mr. Rochon allegedly made the statements in question contradict Mr. Gaudreau's testimony during these proceedings.

The February 23 agreement between the union and the MEA, which QPT was not a party to and did not sign, does not support QPT's position that a "transaction" existed. Both Mr. Morin's statements about the circumstances that led to the conclusion of that agreement and the wording of the agreement itself confirm that it had only one purpose: changing the arbitral award to correctly identify the employer

spokesperson against which the grievances were directed. For this purpose, certain steps had to be taken: the union (and not the MEA) had to waive its right to demand that QPT pay the money owed, and the parties to the grievances had to jointly request that the arbitrator amend his original award.

QPT's claim that the discontinuance of its motion in evocation following the above-mentioned agreement concretized a "transaction" between it and the MEA is not founded. It is clear from reading that document that the MEA and the union waived the right to demand that QPT pay their legal fees and nothing more. Not only does the wording of the discontinuance not justify a conclusion that it was meant to reach some type of settlement relating to the respective liability of the MEA and QPT for violations of the collective agreement, but it also cannot be reconciled with the history of the relationship between the MEA and QPT, inter alia as regards their claims about their obligations and roles in financial matters.

QPT has not shown that the MEA in any way waived its right to seek reimbursement from QPT of the money it had to pay as an individual employer as a result of the violations of the collective agreement against which the grievances in question were directed. Nor has QPT shown that it was inappropriate for the Board to intervene under section 34(7).

IV

After reviewing the evidence and the parties' submissions, the Board found that the employer representative has the power to require individual employers to assume responsibility for obligations resulting from their own violations of the collective agreement. The employer representative must have this power if it is to discharge its responsibilities under section 34(5) so as to ensure that the collective labour relations system in the longshoring industry functions properly (Quebec Ports Terminals Inc. et al. (1076), supra).

In the instant case, the MEA can require QPT to assume responsibility for the money owed to the longshoremen and to reimburse the MEA for the amount it had to pay them.

The Board has the necessary powers to resolve disputes relating to the implementation of the section 34 system (see Quebec Ports Terminals Inc. et al. (1076) and Quebec Ports Terminals Inc. (1124), *supra*). The Board has therefore fashioned remedies to deal with QPT's refusal to assume its financial obligations resulting from its violations of the collective agreement.

FOR THESE REASONS, the Board:

ALLOWS the MEA's application;

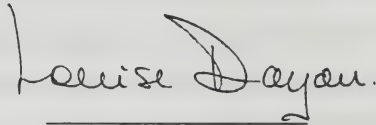
DECLARES that the MEA has the power to require individual employers to assume responsibility for financial obligations resulting from their violations of the collective agreement;

DECLARES that the MEA is authorized to claim reimbursement from QPT of the money it paid the longshoremen as a result of QPT's violation of the collective agreement;

ORDERS QPT to reimburse the MEA \$4,538.34, plus interest, which the MEA paid pursuant to the amended arbitral award of October 25, 1993 issued by arbitrator Claude H. Foisy.

Should the parties fail to agree on the implementation of the above remedies within 15 days of this decision, the Board reserves the right to intervene at the request of either party to settle questions arising from the implementation of this decision and to order any further remedy to resolve the present dispute.


The Board appoints Ms. Suzanne Pichette, Regional Director of the Montréal office, or any other person she may appoint to assist the parties in implementing these remedies.



Louise Doyon
Vice-Chair



Sarah E. FitzGerald
Member



Roza Aronovitch
Member

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Summary

Nathalie Beaudet-Fortin, *complainant*, and Canadian Union Postal Workers, *respondent*.

Board File: 17330 (745-5337)
CCRT/CLRB Decision no. 1216
December 16, 1997

This case deals with a complaint of unfair labour practice alleging violation of sections 95(f) and (g) of the Code by the Canadian Union of Postal Workers (CUPW).

The complainant was expelled from CUPW by the Regional Disciplinary Committee (RCD), which found that the complainant had engaged in raiding activities, thereby contravening CUPW's by-laws. This decision was upheld by the National Disciplinary Committee (NDC).

The complainant alleged that the RCD and NDC breached the rules of natural justice at the processing stage of the complaint accusing her of having engaged in raiding activities. She also alleged that the sanction taken against her was discriminatory.

The Board found that the RDC and NDC did not breach the rules of natural justice. The Board applied the "genuine" bias standard and found that the fact that RDC members were the complainant's "opponents" did not prevent them from acting in this capacity. Moreover, the NDC's refusal to grant a postponement and the fact that the complainant did not have access to CUPW's internal jurisprudence do not constitute a breach of the rules of natural justice.

Résumé

Nathalie Beaudet-Fortin, *plaignante*, et Syndicat des travailleurs et travailleuses des postes, *intimé*.

Dossier du Conseil: 17330 (745-5337)
CCRT/CLRB Décision n° 1216
le 16 décembre 1997

Il s'agit d'une plainte de pratique déloyale alléguant violation des alinéas 95f) et g) du Code par le Syndicat des travailleurs et travailleuses des postes (STTPC).

La plaignante a été expulsée du STTPC par le Comité régional de discipline (CRD) qui a conclu que la plaignante s'était livrée à des activités de maraudage et avait ainsi enfreint les statuts du syndicat. Cette décision a été maintenue par le Comité national de discipline (CND).

La plaignante allègue que le CRD et le CND ont enfreint les règles de justice naturelle à l'occasion du traitement de la plainte l'accusant d'avoir participé à des activités de maraudage. Elle allègue aussi que la mesure disciplinaire qui lui a été imposée est discriminatoire.

Le Conseil a décidé que le CRD et le CND n'ont pas enfreint les règles de justice naturelle. Le Conseil applique la norme de la partialité «réelle» et juge que le seul fait que des membres du CRD étaient des «opposants» de la plaignante ne les empêchait pas d'agir à ce titre. Par ailleurs, le refus du CND d'accorder une remise d'audience et l'impossibilité pour la plaignante d'avoir accès à la jurisprudence interne du syndicat ne constituent pas en l'espèce des violations des règles de la justice naturelle.

The majority of the Board found that CUPW violated sections 95(f) and (g) of the Code by expelling the complainant for the sole reason that she had engaged in lawful raiding activities within the period authorized by the Code.

The majority found that section 8.02(f) of the union's statutes, which authorizes the expulsion of a member for having participated in raiding activities, is in itself discriminatory since it is contrary to the Code and is unreasonable.

A union's authority to expel a member for the sole reason that he participated in raiding activities is function of a fair balance between the interests of the employee and those of the union. This balance must take into consideration the right to exclusive representation granted to the certified union and the freedom of association provided for in section 8(1) of the Code. In fact, expulsion from union membership significantly affects the employee's interests, as this deprives the employee of the right to participate in union activities which directly stem from exclusive union representation. The Board acknowledged, however, that when facing a raiding campaign, a union may react by taking certain sanctions against a member who engages in such activities in order to protect its institutional interests and the collective interests of its members.

In the present case, the complainant's expulsion was intended to penalize her for having exercised, pursuant to the Code's provisions, her right to change bargaining agent. That decision also deprived the complainant of her right to deal with her

Le Conseil à la majorité juge que le STTP a enfreint les alinéas 95f) et g) du Code en expulsant la plaignante pour la seule et unique raison que celle-ci a exercé des activités licites de maraudage pendant la période prévue au Code.

La majorité a considéré que le paragraphe 8.02 (f) des statuts du syndicat, qui autorise l'expulsion d'un membre pour avoir participé à des activités de maraudage, est en soi discriminatoire en soi, puisqu'il est contraire au Code et déraisonnable.

Le pouvoir d'un syndicat d'expulser un membre pour la seule raison qu'il a participé à des activités de maraudage est fonction du respect d'un juste équilibre entre les intérêts de l'employé et ceux du syndicat. Cet équilibre doit s'apprécier en tenant compte du droit exclusif de représentation conféré au syndicat accrédité et de la liberté d'association prévue au paragraphe 8(1) du Code. En effet, l'expulsion des rangs du syndicat influence de façon déterminante sur les intérêts de l'employé qui se trouve alors privé du droit de participer aux activités syndicales qui découlent directement du monopole de représentation syndicale. Le Conseil reconnaît cependant qu'un syndicat qui fait face à une campagne de maraudage peut réagir à cette situation et prendre certaines mesures à l'endroit d'un membre qui participe à des activités de maraudage afin de protéger ses intérêts institutionnels et les intérêts collectifs de ses membres.

Dans la présente affaire, l'expulsion de la plaignante avait pour but de la pénaliser pour avoir exercé de façon conforme au Code son droit de changer d'agent négociateur. Cette décision a aussi privé la plaignante de son droit de traiter avec son représentant exclusif.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

exclusive representative regarding the determination of her working conditions, in the same way as the other employees in the bargaining unit who exercised their right to belong to the union to this end.

The Board rescinded the complainant's expulsion, stating that clause 8.02 (f) of the by-laws is inapplicable in this case, and ordered that the complainant be reinstated in the union membership.

SEPARATE REASONS OF MEMBER MARLEAU

The Member is of the view that the rule in the Union's constitution providing that raiding is conduct liable to the penalty of expulsion is not in itself discriminatory, as this rule makes no distinction between persons or groups on unlawful, arbitrary or unreasonable grounds, and is based on justifiable considerations.

Furthermore, there is no direct causal link between the offence of raiding and expulsion, the choice of penalty being left to the union's disciplinary body. Therefore, in determining whether the Union applied its rules in a discriminatory manner, the Board must base its review on the certified union's exercise of its disciplinary power.

In this regard, however, the Member concurs with the majority's finding that the complaint must be allowed because the Union applied its rules in a discriminatory manner in expelling the complainant from its ranks solely because she had participated in legitimate raiding activities. While the Union's rules were not applied horizontally in a discriminatory manner (the complainant was not treated

pour ce qui est de la détermination de ses conditions de travail, au même titre que les autres employés de l'unité de négociation qui ont exercé leur droit d'adhérer au syndicat dans ce but.

Le Conseil a annulé l'expulsion de la plaignante, a déclaré que le paragraphe 8.02 (f) des statuts ne s'applique pas en l'espèce et a ordonné la réintégration de la plaignante dans les rangs du syndicat.

- MOTIFS DISTINCTS DU MEMBRE MARLEAU

Le membre est d'avis que la règle des statuts du syndicat faisant du maraudage une conduite passible de la sanction d'expulsion n'est pas discriminatoire en soi car cette règle n'établit pas de distinctions entre des personnes ou des groupes pour des motifs illégaux, arbitraires ou déraisonnables et elle s'autorise de considérations justifiées.

D'autre part, il n'y a pas de lien de cause à effet automatique entre l'infraction de maraudage et l'expulsion, le choix de la sanction étant laissé à l'organe disciplinaire du syndicat. C'est donc plutôt sur l'exercice par le syndicat accrédité de son pouvoir disciplinaire que doit porter l'examen du Conseil pour déterminer si le syndicat a appliqué ses règles de manière discriminatoire.

De ce point de vue cependant, le membre partage la conclusion de la majorité selon laquelle la plainte doit être accueillie parce que le syndicat a appliqué ses règles de manière discriminatoire en expulsant la plaignante de ses rangs pour la seule et unique raison que celle-ci a participé à des activités légitimes de maraudage. Bien qu'il n'y ait pas eu application de manière discriminatoire des

differently from other union members in similar situations), the Union's rules were applied vertically in a discriminatory manner. There is "vertical" discrimination when the certified union, as in this case, exercises its disciplinary power in such a manner as to obtain an unwarranted advantage from the representation function provided in the Code to alter in its favour the balance established by Parliament between the interests of the employees and those of the union, which is essential to ensuring the consistent and effective working of the industrial relations system.

règles du syndicat sur le plan horizontal. La plaignante n'a pas été traitée différemment d'autres membres du syndicat dans des situations comparables), il y a néanmoins une application de manière discriminatoire des règles du syndicat sur le plan vertical. Il y a discrimination sur le plan vertical lorsque le syndicat accrédité exerce, comme en l'espèce, son pouvoir disciplinaire de manière à tirer un avantage indu de sa fonction de représentation prévue dans le Code pour altérer en sa faveur l'équilibre prévu par le législateur entre les intérêts des employés et ceux du syndicat, qui est essentiel pour assurer le fonctionnement cohérent et efficace du régime de relations de travail.

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travail

Reasons for decision

Nathalie Beaudet-Fortin,

complainant,

and

Canadian Union of Postal Workers,

respondent.

Board File: 17330 (745-5337)
CCRT/CLRB Decision no. 1216
December 16, 1997

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members. Hearings were held on April 22 and 23 and from October 15 to 18, 1996, as well as on January 6 and 14, 1997, at Montréal.

Appearances

Messrs. Claude Tardif and Gaétan Lévesque, for the complainant; and
Mr. Paul Lesage, for the respondent.

The reasons of the majority were written by Ms. Louise Doyon, Vice-Chair. The separate reasons of Ms. Véronique L. Marleau are appended hereto.

I

COMPLAINT OF UNFAIR LABOUR PRACTICE

On March 13, 1996, Nathalie Beaudet-Fortin (the complainant) filed a complaint of unfair labour practice alleging that the Canadian Union of Postal Workers (CUPW or the union) had treated her in a discriminatory manner in violation of sections 95(f) and

(g) of the Code. Section 95(f) has no bearing on this case and the Board has not taken it into consideration.

Sections 95(f) and (g) read as follows:

"95. No trade union or person acting on behalf of a trade union shall

...

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union; ..."

Ms. Beaudet-Fortin was expelled from the union on November 16, 1995, after the Regional Disciplinary Committee (RDC) ruled that the complaint filed by the union's National Executive Committee (NEC) on December 20, 1994, according to which Ms. Beaudet-Fortin had violated the union's National Constitution (the constitution) by engaging in raiding activities, was valid. The RDC held that the complainant was thus in conflict of interest by working against CUPW.

On November 18, 1995, the complainant appealed that decision.

On February 20, 1996, the National Disciplinary Committee (NDC) unanimously dismissed the complainant's appeal and upheld her expulsion from the union as well as her loss of membership and of the various related benefits.

The complainant is asking the Board to set aside the NEC's complaint of December 20, 1994, and to issue any order it may deem appropriate.

II

THE FACTS

The facts of this case deal with two series of events.

The first involves the actions attributed to the complainant as a result of which the NEC filed a complaint on December 20, 1994. The NEC accused the complainant of having engaged in raiding activities against the union in the fall of 1994, when the Letter Carriers' Union of Canada (LCUC) was conducting a campaign to displace it as bargaining agent for the operations employees unit.

The second concerns the differences of opinion that existed within the union's Montréal local in 1995. These differences reached a high point at the general meeting of August 29, 1995, where members elected delegates to the union's pre-convention regional council meeting and regional conference in anticipation of the union's triennial convention which was to be held in the spring of 1996.

A. Facts Relating to the LCUC Raiding Campaign

The complainant has worked as a letter carrier for the Canada Post Corporation (the employer or CPC) since February 10, 1986. She performs her duties at the Hochelaga-Maisonneuve Postal Station in Montréal.

In the fall of 1994, LCUC conducted a raiding campaign in an attempt to displace CUPW whose collective agreement was to expire on January 31, 1995. This was the third time CUPW's ability to represent employees had been questioned since it was certified and at least the second time LCUC had tried to displace it as bargaining agent.

The complainant had been an LCUC member until 1989, when CUPW became the certified bargaining agent for postal workers and letter carriers employed by the CPC.

In the fall of 1994, the complainant was on education leave without pay.

On November 30, 1994, the complainant attended a meeting organized by the LCUC at a Montréal restaurant and chaired by Claude Prévost, a former full-time LCUC staff member. Mr. Prévost suggested that those in attendance leave the union and join LCUC. During the meeting, he identified Ms. Beaudet-Fortin as "the next generation" and the latter intervened to clarify Mr. Prévost's remarks concerning certain provisions of the collective agreement.

In early December 1994, Ms. Beaudet-Fortin arrived at the Pointe-Claire Postal Station prior to the start of the shift around 6:00 a.m., accompanied by two other persons, to hold a meeting on behalf of the LCUC. Employees signed LCUC membership cards at that time and the complainant spoke about matters pertaining to the interpretation of the collective agreement.

At around 6:15 a.m. on December 6, 1994, Ms. Beaudet-Fortin, dressed in her letter carrier's uniform, appeared in front of the Outremont Postal Station to distribute an LCUC circular inviting employees to an LCUC meeting at a nearby restaurant that same evening. Postal station employees asked the complainant to stop distributing the circular when they realized the nature of the document.

On December 2, 1994, Mr. Vincent Guadagnano, First Vice-President of the Montréal local, signed and distributed a circular in which he claimed that Ms. Beaudet-Fortin was actively engaged in LCUC raiding, while taking advantage of the fact that she was on leave without pay.

On December 14, 1994, the complainant's lawyer sent the Montréal local a formal demand on behalf of his clients, LCUC and the complainant. They considered the December 2, 1994 circular to be defamatory and misleading, particularly with respect to the complainant's motivation for continuing her university education and supporting the LCUC organizing campaign. The complainant's lawyer stated that this action constituted "the exercise of her legal right to participate in the activities of the union of her choice, in this case the Letter Carriers' Union of Canada."

On December 20, 1994, the NEC filed a complaint alleging that Ms. Beaudet-Fortin had violated clause 8.01 of the union's constitution. The NEC resolution stated that the complainant "is accused of violating clause 8.01 of CUPW's national constitution by participating in raiding activities against the union or in activities the purpose or consequence of which was to incite CUPW members to leave that union."

On September 20, 1995, the RDC, composed of Jean-Marc Cossette, Second Vice-President of the Montréal local, as well as Luc Juneau and Michel Paquette, summoned the complainant to a hearing on October 2, 1995, to hear that complaint.

On October 2, 1995, the complainant reported for the hearing accompanied by her representative, who also acts as a grievance arbitrator.

The RDC heard the evidence and decided that the union meetings in which Ms. Beaudet-Fortin had taken part in the fall of 1994, as well as the distribution of an information circular at the Outremont Postal Station, constituted participation in LCUC raiding activities against the union, activities whose purpose was to encourage members to leave the union. The RDC also held that the formal demand of December 14, 1994, confirmed that the complainant was associated with the LCUC and supported its raiding activities.

Messrs. Cossette and Juneau, the majority of the members of the disciplinary committee, decided to expel Ms. Beaudet-Fortin from the union, whereas Mr. Paquette deemed that a letter of reprimand would have been sufficient since, following the events in which she was alleged to have participated in December 1994, the complainant had rejoined the union's ranks and worked in support of the union's interests.

On November 18, 1995, the complainant appealed that decision, alleging "that the main reason for this appeal is that the penalty of expulsion is out of proportion to the offenses of which I am accused."

On January 23, 1996, the complainant was notified that the NDC would hear her appeal on February 19, 1996.

On February 6, 1996, Ms. Beaudet-Fortin asked that the hearing be postponed to enable her to retain competent counsel. She alleged that, since the hearings before the RDC, she had been informed that the defence she had presented to the RDC was inadequate and incomplete. In order to prepare a full and complete defence, she also asked to consult the union's internal jurisprudence on disciplinary cases involving raiding activities conducted by the LCUC.

On February 14, 1996, the complainant was notified that the February 19 hearing would be held as scheduled and that she would be able to present her arguments in support of a request for a postponement at that time. The complainant was also advised that if the committee refused to grant the postponement, the hearing would nevertheless proceed at that time.

On February 16, 1996, Mr. Gaétan Lévesque, counsel for Ms. Beaudet-Fortin, asked the committee for a postponement, indicating that he had only been retained on February 15, that he was not free on February 19 and that he was unable at that time

to appear at a hearing because he needed time to prepare the case. The request was denied.

On February 19, 1996, the complainant reported for the hearing accompanied, in Mr. Lévesque's absence, by Mr. Claude Tardif. Mr. Tardif once again requested a postponement and told the committee that he wished to present arguments on the "de novo" nature of the NDC's hearing. The committee refused to postpone the hearing, but granted the complainant and Mr. Tardif a period of 90 minutes before beginning the appeal hearing. The complainant refused to proceed in this manner and left the premises accompanied by her counsel.

On February 20, 1996, the NDC unanimously dismissed the complainant's appeal on the grounds that she had chosen to leave the premises and that she had not given any reasons in support of her appeal. The NDC upheld the RDC's decision, confirmed the complainant's expulsion from the union and ruled that the complainant had lost her membership and the various related benefits.

B. Facts Relating to the Election of Members Eligible to Become Delegates to the 1996 Triennial Convention

In August 1995, there were differences of opinion between various groups of members of the Montréal local. These differences arose at the time of the election of delegates to the metropolitan Montréal regional council meeting and to the regional conference which was held at the time of the Montréal local's general meeting on August 29.

The election was held in anticipation of CUPW's triennial convention, which was to be held from April 27 to May 6, 1996. It was of particular importance since, in order to be eligible, a member must have attended the pre-convention regional council meeting and the regional conference as a delegate. However, the requirement of being a delegate to these proceedings does not apply to members of the NEC, the regional

executive committees, the national and regional full-time staff members or members of the national board of trustees who are ex-officio delegates to the convention.

Furthermore, standing as a delegate to the convention is an essential pre-condition to running for one of the offices and electing union officials. Thus, national officials are elected by and from among all the delegates, whereas regional officials and the members of the RDC are elected by and from among the regional delegates, who in turn are selected from among those who have been elected and have attended the regional council meeting and regional conference.

In the August 29 election, most of the delegates who were elected at these pre-convention functions were supporters of the complainant's group. Ms. Beaudet-Fortin was also elected. The election results did not however favour the individuals who were associated with the local executive committee or regional executive committee. Indeed, those who lost the elections included Messrs. Jean-Marc Cossette, then vice-president of the Montréal local, and Luc Juneau, both members of the RDC which heard the NEC's complaint against the complainant a few weeks later.

At the Montréal local's general meeting on February 27, 1996, the final list of delegates to the May 1996 convention was established based on the list of delegates elected on August 29 who had attended the pre-convention meeting of the regional council and the regional conference. Ms. Beaudet-Fortin's name was on that list.

The group including Ms. Beaudet-Fortin had planned that certain delegates would run for certain positions on the regional executive committee. The election to those positions was to be held at the May 1996 national convention by and from among the regional delegates who were to include the complainant.

Ms. Beaudet-Fortin had been asked to run for the position of education and organization officer and she had accepted to do so. However, Ms. Beaudet-Fortin was

unable to attend the national convention or, consequently, to run for that position since she was expelled from the union on February 20. She was informed of that decision around March 20, 1996.

III

CLAIMS BY THE PARTIES

A. The Complainant's Position

The complainant claimed that the union had applied the membership and disciplinary standards set out in the constitution in a discriminatory manner by expelling her for having engaged in raiding activities or in activities the purpose of which was to encourage its members to defect. She also claimed that the manner in which the RDC and the NDC had handled her complaint breached the rules of natural justice. The complainant concluded that these acts violated sections 95(f) and (g) of the Code.

First of all, the complainant claimed that it was not proven that she had engaged in raiding activities or that she had wilfully acted against the union. Furthermore, it was not established that she had others sign LCUC membership cards, and the union did not show that it had suffered prejudice as a result of the alleged raiding activities.

The complainant further claimed that she had merely exercised rights recognized under sections 8 and 24 of the Code, which affirm the right of employees to join the trade union of their choice and provide that a certified bargaining agent may be replaced at specific times. The question is thus whether members can support another union and take steps to have that union replace the certified bargaining agent during an "open" period without being subject to reprisals. The complainant alleged that she could not be penalized or deprived of her right to be a member of the union and to participate in its activities for this reason alone. The question that arises deals with

how the exercise of rights protected by the Code can be reconciled with the duty of loyalty towards the union.

She added that she was not in conflict of interest since she did not hold a union position at the time of the events which were raised against her.

Second, the complainant claimed that the December 20, 1994 complaint and the conduct of the RDC and the NDC breached the rules of natural justice. In her view, the complaint did not mention the accusations made against her and the RDC did not provide her with additional details at the hearing held on October 2, 1995.

The complainant further alleged that the composition of the RDC, which included Jean-Marc Cossette and Luc Juneau, opponents defeated in the elections at the pre-convention proceedings of August 1995, a defeat that deprived them of the right to hold a national or regional position from 1996 to 1999, was grounds for a reasonable fear of bias. The same was true of the RDC decision to proceed with a review of the complaint against the complainant at least two months after the election and more than nine months after it was filed. The complainant wondered whether, given the circumstances, her opponents were able to judge her impartially.

The complainant further submitted that the NDC's refusal to grant her requests for a postponement on February 6 and 16, 1996, deprived her of the right to the assistance of counsel of her choice and of the right to make full answer and defence; she also argued that the NDC hearing was in the nature of a trial *de novo*. The NDC could have granted her requests without later being able to claim the fact that it had incurred travelling expenses as grounds for denying her request. This was in fact how the RDC had proceeded in the fall of 1995 when it was seized of requests for a postponement in similar complaints against other members of the Montréal local.

Lastly, the complainant alleged that the fact that she had not been provided with the relevant information on the union's previous decisions dealing with union discipline had caused her prejudice and constituted a breach of the rules of natural justice.

B. The Union's Position

The union submitted that the lack of details in the NEC's complaint respecting the charges against the complainant did not constitute a breach of the rules of natural justice. The complainant knew the reasons for the charges cited by the NEC in its December 20, 1994 complaint. The formal demand of December 14, 1995, the content of which she approved and in which her lawyer had referred to her support for the LCUC organizing campaign, clearly showed this.

The union added that at no time either before or at the start of the hearing of October 2, 1995, did the complainant request clarification or a postponement. Nor did she request a stay of proceedings after the union's evidence to prepare adequately. Instead, she chose to produce only documentary evidence and not to testify. The complainant never challenged the authority, composition or legitimacy of the RDC, and accepted it as it was constituted. Her notice of appeal raised no issue of compliance with the rules of natural justice, of bias, or other irregularities that could have vitiated the conduct of the hearing and the RDC's decision. It was the union's view that Ms. Beaudet-Fortin's training in labour relations and the fact that she was assisted at the hearing by a labour relations specialist shows that her allegations had no merit.

As for the NDC, the union argued that it had acted within the limits of the powers conferred to it by the constitution and that it had not breached the rules of natural justice in refusing to grant the requests for a postponement. The complainant failed to prepare adequately for the February 19, 1996 hearing after receiving the notice of hearing on January 23, 1996. She delayed retaining the services of counsel even after

being informed of the first refusal on February 14, 1996. She then chose to leave the February 19 hearing after the NDC refused to grant her request for a postponement. Lastly, the union emphasized that the main reason why Ms. Beaudet-Fortin wanted the adjournment was dilatory: she hoped that her appeal would not be heard until after the Triennial Convention. As such, her union membership would have been maintained pending the outcome of the appeal, she would have attended the convention and run for regional education and organization officer and, after the convention, the composition of the RDC might have changed in her favour.

As regards the charges relating to the complainant's participation in LCUC raiding activities, the union noted that there was uncontradicted evidence that Ms. Beaudet-Fortin had attended and played an active role in at least two meetings organized by the LCUC where the union's replacement by the LCUC was on the agenda and where she had played an active role. At one of those meetings, she was identified by an LCUC representative as being "the next generation." She also distributed a circular announcing that an LCUC meeting would be held. According to the union, the nature of Ms. Beaudet-Fortin's actions and the LCUC's objective at the time established that she had engaged in raiding activities contrary to the union's interests.

As to whether participation in raiding activities constitutes a right provided or an activity protected by section 8 of the Code, the union answered in the affirmative, just as it admitted that dual membership is permitted under the Code. However, the union maintained that it is not illegal for a union confronted with raiding activities to defend itself and to protect its interests by applying the disciplinary standards set out in its constitution. In the present case, the constitution provides that members who engage in raiding activities commit an offence and are liable to penalties that may include expulsion from the union. The union admits that this penalty deprives bargaining unit employees of their membership and related privileges, even if the activities with which they are charged are not contrary to the Code. In the union's view, these provisions

are permitted by law and their application to the complainant did not constitute discriminatory treatment contrary to the Code.

IV

THE MATTERS AT ISSUE

In this case, the Board must decide two questions.

The first is whether the union's disciplinary bodies breached the rules of natural justice in handling the NEC's complaint, contrary to sections 95(f) and (g) of the Code.

The second pertains to the scope of the union's disciplinary power and, specifically, the right to deprive the complainant of her membership by expelling her from its ranks for the sole reason that she had engaged in raiding activities authorized by the Code. This raises another question concerning the impact of the right granted to employees under section 8(1) of the Code, namely the right to join the trade union of their choice and to participate in its lawful activities, on sections 95(f) and (g) of the Code.

A. Compliance with the Rules of Natural Justice

Wording of the Complaint, Composition of the RDC and Operating Methods of the RDC and the NDC

Contrary to Ms. Beaudet-Fortin's claims, the Board is satisfied that she knew, or ought to have known, of the allegations made against her by the NEC on December 20, 1994, having regard to her actions of November and December of that same year. Those actions resulted in the open letter from the vice-president of the

Montréal local, to which Ms. Beaudet-Fortin answered through her lawyer and in which she admitted she had engaged in LCUC raiding activities. In this regard, the Board finds that the wording of the complaint is consistent with clause 8.17 of the constitution and, in the circumstances, meets the requirements of the rules of natural justice.

However, if the complainant believed she could not adequately defend herself, she was free to request a postponement from the RDC at the October 2, 1995 hearing or to seek clarification before or at the start of the hearing, or to request a stay of proceedings after the union had brought its evidence. She did nothing of the kind. Consequently, the Board cannot accept her claim that the rules of natural justice were breached in this regard.

As to the composition of the RDC, the persons sitting on the committee had been elected in accordance with the constitution and, strictly speaking, were competent to hear the complaint brought against Ms. Beaudet-Fortin. The fact that two members of the RDC were "opponents" of Ms. Beaudet-Fortin did not in itself prevent those persons from performing their duties as RDC members. This fact alone is not considered in case law as constituting a breach of the rules of natural justice, even though, in situations similar to the present case, some may have perceived a form of bias in individuals exercising these duties.

In response to this claim, the tribunals have adopted the "genuine" bias standard in defining and applying the criterion of impartiality to "domestic" tribunals. (See Marilyn Coleman et al. (1995), 28 CLRBR (2d) 1 (B.C.); and Val Udvarhelyi (1979), 35 di 87; and [1979] 2 Can LRBR 569 (CLRB no. 200).)

However, Ms. Beaudet-Fortin did not raise or establish against Messrs. Cossette and Juneau any other cause for criticism than the mere fact that they were not on the same team.

Lastly, the complainant did not raise this objection at the appropriate time, that is, as case law generally requires, when the complaint was being considered before the RDC.

In the circumstances, the Board is satisfied that the composition of the RDC met the requirements of the rules of natural justice.

Evidence of the Accusations against the Complainant before the RDC

Ms. Beaudet-Fortin alleged that she did not take part in the LCUC campaign, the purpose of which was to displace the union, and that, consequently, she did not engage in raiding activities as the union claimed.

The RDC heard factual evidence on this matter. It found that Ms. Beaudet-Fortin had attended two LCUC meetings, that she had played a prominent role there and that she had taken the initiative of distributing a circular inviting the employees of the Outremont Postal Station to an LCUC meeting. Ms. Beaudet-Fortin did not deny these facts. Although no evidence was brought that she had joined LCUC or had prompted other employees to join, such evidence was not essential to the conclusion the RDC reached respecting Ms. Beaudet-Fortin's participation in raiding activities. Based on uncontradicted evidence, the RDC and the NDC did not act in a discriminatory manner by finding that the complainant had engaged in such activities. Other union disciplinary committees have drawn similar conclusions in comparable circumstances. (See in particular Paul Horsley et al. (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRBR no. 861).) In this sense, the complainant was not treated differently from other union members in similar circumstances.

Legitimacy of Denying the Request for a Postponement

Ms. Beaudet-Fortin alleged that the NDC's refusal to grant her request for a postponement of the appeal hearing breached the rules of natural justice since she was deprived of her right to make full answer and defence and of the assistance of the counsel of her choice.

According to clause 8.24 of the union's constitution, the union's disciplinary committees decide on the rules of procedure that apply to the hearing and may grant postponements and adjournments. In its denial of the complainant's recent request for a postponement, the NDC told Ms. Beaudet-Fortin that it would hear her arguments on the request at the hearing and would subsequently rule on the matter. This is what it did and, after deciding to hear the appeal, it granted the complainant and her counsel a period of time, a short one it is true, before proceeding.

Ms. Beaudet-Fortin had known since January 23 that her appeal was to be heard on February 19 and she should have suspected, if not known, that the NDC would want to proceed as soon as possible, in view of the nature of the complaint against her and of the impending national convention. In the circumstances, when informed of the first refusal, Ms. Beaudet-Fortin should at least have taken steps to be able to proceed if her request was denied again that same day. She made another choice and decided to leave the premises.

The Board does not believe that the NDC's refusal constitutes a breach of the rules of natural justice. It is true that the NDC did not proceed in the same way as the RDC which, in the fall of 1995, granted requests for a postponement in similar complaints without a hearing. However, each disciplinary committee controls its own procedure and the fact that the NDC decided otherwise does not imply that its procedure was contrary to the rules of natural justice. The committee exercised its discretion and there is no indication that it exercised it in an arbitrary or discriminatory manner. In

this regard, the Board cannot overlook the fact that Ms. Beaudet-Fortin admitted somewhat candidly that the main reason she wanted a postponement was that she did not want to proceed before the NDC as it was then constituted, feeling that her chances of winning her appeal would be better after the national convention. In fact, she believed that, at the convention, she would be elected an officer of the metropolitan Montréal region and that there was a strong chance the NDC's composition would be altered at the convention.

Right to Make a Full Answer and Defence

The Board must now deal with the question of Ms. Beaudet-Fortin's access to the decisions of disciplinary committees regarding penalties for participating in raiding activities.

The union admitted that it had neither a system for classifying its disciplinary jurisprudence nor a reference system. It also admitted that this was why the complainant was unable to gain access to the precedents that might have helped her support her position.

This situation may work to disadvantage union members relative to union representatives who have information which is inaccessible to a member, simply by reason of the privileged relationship of union representatives within the union's internal organization. This situation could be interpreted as a double standard respecting access to relevant information that raises doubts as to compliance with the rules of natural justice.

In this case, however, on the whole of the facts, this situation does not constitute a breach as it would lead the Board to conclude that the union had acted in a discriminatory manner by not making any relevant decisions available to the complainant. The Board believes, however, that this deficiency should be corrected.

It therefore strongly encourages the union to implement a simple, easy-access classification and reference system to make available to members who are the subject of complaints the information to which they are entitled.

B. Scope of the Union's Disciplinary Power and Exercise by Employees of Rights under the Code

After the failure of the LCUC's raiding campaign, Ms. Beaudet-Fortin expressed her intention to remain a member of the union and to take an active part in union activities, as is shown by her election as a delegate to the Triennial Convention in the spring of 1996. It was moreover this participation in union business that led one of the RDC members to recommend that the complainant be reprimanded rather than expelled from the union.

The complainant claimed, it should be recalled, that, in expelling her and depriving her of her status as a CUPW member and of related benefits for the sole reason that she had engaged in raiding activities, the union had acted in a discriminatory manner contrary to sections 95(f) and (g) of the Code.

The union answered that it had applied the relevant provisions of its constitution to the complainant without discrimination. The NEC filed a complaint against Ms. Beaudet-Fortin under article 8 of the union's constitution. The constitution provides that a member in good standing and union authorities may file a complaint against a member or an officer who has violated clause 8.01. The union added that this complaint was handled in accordance with the constitution.

Clause 8.01 reads as follows:

"8.01 Penalties may be imposed on a member or officer of the Union or Local if he/she committed any of the following offenses:

...

(d) if he/she engaged in raiding against the Union or in activities whose purpose or effect is to incite the withdrawal of a member or Local; ...

Without limiting the general character of the aforesaid offenses, the following actions are among others regarded as offenses:

...

(2) having worked in the interest of any organization competing with the Union in a manner which is detrimental to the Union; ..."

Clause 8.02 states the penalties that may be imposed on members:

"8.02 The following penalties may be imposed on a member or officer of the Union or Local:

- (a) written reprimand;*
- (b) suspension from office for a specified period of time;*
- (c) removal from office;*
- (d) withdrawal of the right to hold office in the Union or Local for a specified period of time;*
- (e) suspension from membership for a specified period of time;*
- (f) expulsion from the Union."*

Clause 8.03 provides a general statement of the rules applicable in disciplinary matters:

"8.03 The aforesaid penalties may only be enacted pursuant to the rules and procedures laid down in the following sections."

The Board has already found that the rules and procedure referred to in clause 8.03 concerning the composition of disciplinary committees and the applicable rules of procedure were followed. However, the question before the Board has not been dealt with since it goes beyond the matter of compliance with rules of procedure or an allegation that the complainant was treated differently from other union members in similar situations.

The present case deals with the limits of the union's disciplinary power with respect to a member who exercised her right to change bargaining agent in accordance with the Code, in cases where that member wished to remain a member of the certified union and take part in its activities following the failure of the raiding campaign.

To determine whether CUPW violated sections 95(f) and (g) of the Code, the Board must therefore decide whether a union discriminates when it relies on its constitution to expel, suspend or deny membership to employees or discipline them for the sole reason that they engaged in raiding activities authorized by the Code and, in the present case, for the sole reason that the complainant engaged in the LCUC's raiding activities. The question raised relates to the nature and scope of the rights of unions to adopt rules of internal management respecting union membership, having regard to the limitations imposed by section 95 of the Code, limitations which are designed to protect the freedom of employees to belong to the trade union of their choice and to participate in its lawful activities.

The legitimacy of such rules of internal management is a function of the equitable balance between the differing but legitimate interests of bargaining unit employees and those of the certified union in the context of the provisions of section 95 of the Code. In this case, one must consider, on the one hand, the right of employees to join the trade union of their choice and to participate in lawful union activities and, on the other hand, the union's legitimate interests in protecting itself from raiding by enacting rules for that purpose. In this context, we must consider the consequences

of exclusive union representation on which our collective bargaining system is based and which confers on the certified union the exclusive right to represent bargaining unit employees with respect to the determination of their conditions of employment.

(1) Board's Role under Sections 95(f) and (g) of the Code and Notion of Discrimination

In its first decisions, the Board defined its role and the nature of the control it was to exercise on a union's conduct. In Ronald Wheadon et al. (1983), 54 di 134; 5 CLRB (NS) 192; and 84 CLLC 16,004 (CLRB no. 445), it described that role as follows:

"It should be made very clear that this Board is not an appeal body from internal union discipline. The role of the Board under section 185(g) of the Code is to ensure that discipline standards, which includes the basis for their application, the manner in which they have been applied and the results of their application, are free from discriminatory practices. In performing that task the Board shall not, as stated previously, apply a standard that would negate the informality provided for in the constitutions of some trade unions. What the Board does expect though, are realistic, human and plausible explanations from trade unions for their conduct."

(pages 150; 209; and 14,036-14,037; emphasis added)

This concept of the Board's limited role confirmed the reasoning adopted in Fred J. Solly (1981), 43 di 29; [1981] 2 Can LRBR 245; and 81 CLLC 16,089 (CLRB no. 296), and in Jim Saunders (1988), 74 di 165 (CLRB no. 701). This approach has always been followed, as the Board recently recalled in Angelo Mangatal (1997), as yet unreported CLRB decision no. 1208.

Furthermore, the Board has always given a broad interpretation to the notion of discrimination, which is the monitoring standard in this case. In the first case in which it dealt with this question, Paul Hewitt et al., July 31, 1975 (LD 9), the Board stated:

"The Board is far from satisfied that the word 'discriminatory' as used in section 185 and particularly in section 185(f) and 185(g) can be given such a restricted meaning as the respondent has suggested.

...

In trying to determine whether a violation of the Code has occurred, the Board must consider not only the result of the application of disciplinary standards but the basis for their application and the manner in which they have been applied. It is only from an overall consideration of these elements that the Board can effectively determine whether a violation of section 185(g) of the Code has taken place."

(page 3; emphasis added)

The Board also adopted the definition of discrimination of the Nova Scotia Labour Relations Board set out in Daniel Joseph McCarthy, [1978] 2 Can LRBR 105, and confirmed it in particular in Gérard Cassista et al. (1978), 28 di 955; and [1979] 2 Can LRBR 149 (CLRB no. 161):

"In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S., 1969, c. 11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. ..."

(McCarthy, supra, page 108; emphasis added)

In Gérard Cassista et al., supra, the Board more clearly stated the method that should be used to determine whether there has been discrimination:

"... we must ask ourselves, initially, whether or not the rule is in itself discriminatory. If it is discriminatory, then its application is necessarily discriminatory. ..."

(pages 978; and 168)

And to this statement that the application of a discriminatory rule is in itself discriminatory, the Board added in Fred J. Solly, *supra*:

"The Board does not determine the scope of offenses for which a union may discipline or deny membership. (The role of the Courts in the United States is similar. See Boilermakers v. Hardeman 401 U.S. 233; 76 LRRM 2542 (1971).) This does not mean the Board is not concerned about union membership rules. The application of rules, whether written or not, that are discriminatory in themselves will be a breach of sections 185(f) and (g) [now 95(f) and (g)]..."

(pages 45; 257; and 566)

Thus, if a disputed rule is itself discriminatory, its application necessarily results in a violation of the Code. The same will be true if the application of a rule that is not in itself discriminatory has discriminatory consequences.

Therefore, although a union must protect its rights, it cannot adopt or apply rules that have the effect of altering in an "illegal, arbitrary or unreasonable" way the balance contemplated by section 95.

Thus, as regards union membership and sanctions, the Board, pursuant to sections 95(f) and (g), held that the absence of discrimination, which is the standard of conduct imposed on trade unions, depended on respect for a balance between the institutional interests of unions and the individual rights of their members. It recently reiterated this in Andreas Angellakis (1996), 103 di 76; and 97 CLLC 220-011 (CLRB no. 1192), citing Mr. James Dorsey, former Vice-Chair of the Board, on the subject:

"... the underlying concern and central thrust of the decisions is to balance the right of the individual to participate in the affairs of the union, which is his bargaining agent, against the lawful activities and interests of the union which favour denial of membership generally or to the specific individual. ..."

(James Dorsey, "Individuals and Internal Union Affairs: The Right to Participate" in Swan and Swinton, eds, Studies in Labour Law, (Butterworths: Toronto, 1982), page 200; emphasis added)

(2) Respective Rights and Interests of Union and Employees under Section 95

Seeking a balance between the union's institutional interests and the employees' individual interests in the context of the provisions of section 95 raises a number of questions.

The courts have confirmed the unions' right to govern their internal affairs and to adopt rules in their constitution for that purpose, including dispute settlement mechanisms and the imposition of sanctions for failing to comply with those rules. They have required that unions adopt a constitution to prove they exist and to show that their objectives are consistent with the definition of "trade union" in the Code in order to obtain the status of certified bargaining agent.

The law has evolved and become clearer over the years with the increase in rights and powers granted to trade unions by the various legislative collective bargaining systems.

In its report entitled Industrial Relations in Canada: Woods Report on Canadian Industrial Relations (Ottawa, Privy Council Office, December 1968) (H.D. Woods, Chairman), the Woods Task Force recalled the evolution of the legal and socio-political status of trade unions in the following terms:

"485. Trade unions originated as voluntary unincorporated associations of craftsmen who banded together to set rates at which they agreed to sell their services and to secure job opportunities for their members. Today, many interests of trade unions are vested in the legal framework of collective bargaining, including monopoly bargaining rights. They can no longer claim the status of private associations whose internal affairs are solely their concern. They have become quasi-public bodies, if not public institutions, and the public has acquired an interest in their internal operations."

(emphasis added)

Section 95 of the Code was enacted in 1972 to offset the increased powers granted to the trade unions, in particular the monopoly of bargaining rights.

The purpose of that provision is to limit and provide a framework for the trade unions' discretion with respect to their members and to protect employees' individual freedoms. In Gérard Cassista et al., *supra*, the Board recalled Parliament's intent in this regard, after emphasizing that under section 25(2) (then section 134(2)), the Board could refuse to certify a union if it were established that union applied discriminatory membership practices:

"In other words, Parliament felt that the employee's fundamental right to belong to the union of his choice which is set out in section 110(1) [now section 8(1)], was so important that it ordered that a union which did not respect this fundamental right should suffer the ultimate penalty - non-certification. This same concern for protecting the fundamental right recognized by section 110(1) is the basis for section 185(f) [now section 95(f)]. ..."

(pages 976; and 166; emphasis added)

Section 8(1) of the Code reads as follows:

"8. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

The trade unions' status as quasi-public bodies and the extent of their rights and powers, including the exclusive bargaining right, has also very much affected the way in which the courts have interpreted the unions' right to regulate their internal affairs, including bargaining unit employees' right to join a trade union and participate in its activities. (See on this subject Gérard Cassista et al., *supra*, at pages 973-976; and 164-166; and Alcorn and Detwiler (1995), 95 CLLC 220-069 (SLRB). Regarding the context in which the rules and objectives contemplated in section 95 are adopted, see also Claude Pilette c. Syndicat des Postiers du Canada, [1991] R.J.Q. 1015 (C.S.), page 1018.)

Section 95 of the Code thus places limits on the trade unions' right to discipline their members. However, neither the purpose nor the effect of these limits is to deprive the unions of their right to establish the internal rules and mechanisms they deem appropriate to protect their own institutional interests and those of the employees they represent or to take measures to ensure that the internal operation of their organization is coherent, stable and conducive to the fulfilment of their obligations and the protection of their rights, including the imposition of sanctions where those rules are violated.

The consequences of these measures must be viewed in light of the conditions in which the exclusive bargaining right granted to a union by certification is exercised and of the effects of that right. The exclusive bargaining right is provided for in section 36(1)(a) of the Code:

"36. (1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;..."

The Supreme Court of Canada has long recognized the legality of a union's exclusive right to bargain and the mandatory nature of the provisions of a collective agreement. (See McGavin Toastmaster Limited v. Bernice Letitia Ainscough et al., [1976] 1 S.C.R. 718, at pages 724-725; and Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206.)

The first consequence of the exclusive right to bargain is to strip bargaining unit employees of their individual freedom to deal directly with the employer. Once the union is certified, the employees must deal exclusively with it with respect to the determination of their conditions of employment, which are then set out in the collective agreement. This is confirmed by section 56 of the Code:

"56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer."

On this subject, authors Pierre Verge and Gregory Murray emphasize that a union's imposition of sanctions, in particular expulsion from the union, must be assessed in view of this fact:

"In addition, in the case of a certified trade union, withdrawal of membership, in the same way as the admission of a new member, must be seen in light of the absolute effect of the legal representation function that the organization performs within the bargaining unit..."

(Pierre Verge and Gregory Murray, Le droit et les syndicats: Aspects du droit syndical québécois (Sainte-Foy: Presses de l'Université Laval, 1991), page 214; translation; emphasis added)

Therefore, the consequences of withdrawal of membership on employees' right to participate in the union's activities that affect their conditions of employment must be

viewed in the context of exclusive union representation. Generally speaking, only employees who are members of a union may participate in its activities, and that was the case in this instance.

Like exclusive union representation, employees' fundamental freedom under section 8 of the Code to join the union of their choice and to participate in its lawful activities is one of the cornerstones of the labour relations system provided for in the Code, as expressly stated in the preamble. However, this freedom is not absolute and has been defined having regard to the other provisions of the Code and to its objectives (see Canadian Broadcasting Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRB no. 839), pages 141 ff.; and 14,113 ff.).

The freedom to join the union of one's choice is understood first in its literal sense as the right of employees to become members of the association of their own choosing, provided those employees meet the membership conditions set by the union, which must satisfy the non-discrimination requirement. Once the membership conditions are met, the union, and all the more so a certified bargaining agent that holds the exclusive right to represent employees seeking admission, may not deny the applicant membership. Attached to this freedom to join the union of one's choice is the corollary set out in section 8 of the Code, the freedom to participate in the union's lawful activities.

The Code also provides for the right of employees to try to change their bargaining agent and to withdraw its exclusive right to bargain. The freedom of association provided for under section 8 of the Code may therefore be exercised against the certified union with a view to replacing it, if a majority of the bargaining unit members so chooses.

A certified bargaining agent's power to expel a member for the sole reason that the member lawfully exercised the right to change bargaining agent must therefore be

assessed in view of the freedom of association under section 8 of the Code and of the consequences of such a sanction on that member's rights. In practice, the member is thus deprived of access to the union's activities, in particular those stemming directly from exclusive union representation.

(3) Application of These Principles to the Present Case

CUPW's exclusive representation as bargaining agent is determining in this case since the union in fact expelled Ms. Beaudet-Fortin for attempting to challenge its monopoly of representation.

That is why, in view of the foregoing and despite the provisions of CUPW'S constitution, which allows expulsion for participation in raiding activities, the Board finds that the union could not exercise its disciplinary power as it did by expelling the complainant unreservedly and unconditionally for the sole reason that she had engaged in lawful raiding activities.

We have no doubt, the union, in acting in this manner, was seeking to protect its institutional interests. Its decision was intended to punish the complainant for acting in a manner that, in its view, was contrary to its interests when she exercised her right to change the bargaining agent in accordance with the Code. In the circumstances, exclusive union representation places certain limits on a certified union that intends to react to the stance of some of its members during a raid. While it is true that participation in raiding activities may constitute a threat and undermine the bargaining agent's integrity, the Code nevertheless provides that both bargaining unit employees and union members have the right, at specific times, to try to change bargaining agents and to encourage other employees to change bargaining agents so as to call the certified agent's status into question. This is why employees may not, for this reason alone, be absolutely stripped of the right to remain members of the certified bargaining agent if the raiding campaign fails.

In this case, however, the union's decision to expel the complainant indefinitely deprived Ms. Beaudet-Fortin absolutely of the right to exercise her free choice to remain a member of the certified bargaining unit, CUPW, following the raiding campaign and to participate in its activities and, consequently, deprived her of the right to deal with her exclusive representative with respect to the determination of her conditions of employment in the same way as the other bargaining unit employees who joined the union for this purpose. By expelling the complainant from its ranks, the union deprived her of her right to participate in its activities and to influence the manner in which the certified bargaining unit performed its role in negotiating the collective agreement that governs the complainant's conditions of employment.

To this extent, the rule on which the union relied in this case, clause 8.02(f), which authorizes the expulsion of a member from its ranks for engaging in raiding activities, is in itself discriminatory since it is contrary to the provisions of the Code that allow employees and members of a certified union to exercise their freedom of association, which in this instance meant trying to change the bargaining agent and taking part in lawful union activities. It therefore follows that the application of that clause constitutes a violation of the Code, in accordance with the rules stated in Fred J. Solly, *supra*; and Terry Matus (1980), 37 di 73; [1980] 2 Can LRBR 21; and 80 CLLC 16,022 (CLRB no. 211), confirmed by the Federal Court in International Longshoremen's and Warehousemen's Union, Local 502 v. Terrance John Matus et al., [1982] 2 F.C. 549. In addition, that rule is unreasonable because it bears no "fair or reasonable relationship" to the protection of the legitimate interests sought by the union and thus unduly alters the balance that must be maintained between the union's and the employees' interests as provided by section 95 of the Code.

However, this does not mean that a union confronted with the raiding activities of some of its members is not entitled to react to the situation. A union faced with a raiding campaign may take steps to protect its institutional interests and the collective interests of its members. A union would do well to promote the loyalty and solidarity

of its members so as to be able to act effectively as certified bargaining agent. For this reason, a union whose bargaining agent status has been questioned during a raiding campaign may react to protect its interests and integrity and ensure its smooth operation and the efficient management of its affairs.

The Board's remark on this point in Fred J. Solly, supra, thus becomes clear:

"The legislation recognizes unions must have institutional interests that may be advanced if they are to function as effective collective bargaining agents and democratic organizations. ..."

(pages 44; 257; and 566)

Consequently, a union may definitely establish internal rules to set a framework for and place limits on membership conditions for employees who engage in raiding activities. It may also provide for sanctions for violations of those rules. However, these rules and sanctions may not deprive employees of their right to be members or to take part in the collective decisions that directly stem from the union's exclusive right to bargain.

A union may thus limit access to key positions for individuals who, until recently, have not shown they have the union's interests, orientation and achievements at heart. In particular, the union may prevent members from standing as candidates for elected office or from being appointed to representative positions. Clauses 8.02(b), (c) and (d) of CUPW's constitution already provide for this possibility. The Board recognizes that a union official has a duty of loyalty and must discharge a special fiduciary obligation toward the union and that the union may take harsher measures in such cases to protect its legitimate interests (see on this subject Coleman, supra). The union may also prevent members from taking part in union proceedings, except of course where members are called upon to make collective decisions on the negotiation or conclusion of a collective agreement.

In short, the union must ensure that the measures taken cannot be perceived as reprisals to punish employees for exercising rights under the Code, but rather as measures to protect its institutional interests and the collective interests of its members. Regardless of the measures chosen by the union, they must be based on the nature and scope of the interests it must protect, be free of discrimination and ensure that the employees concerned have a genuine opportunity to participate, like all other union members, in the union's activities that stem directly from its exclusive representation and affect conditions of employment. As the Board stated in Paul Horsley, *supra*, at pages 213; and 153, the sanction imposed by the union must bear a "fair or reasonable relationship" to the accusations against the member.

This approach is consistent with the opinion of the Woods Task Force that members who are engaged in activities that may compromise the bargaining agent's status leave themselves open to disciplinary action, the nature of which is not specified:

"493. ... Rules should not be such as to preclude union members from engaging in otherwise lawful conduct unless that conduct seriously undermines the union's position as a bargaining agent. Thus, for example, dual unionism would not be a legitimate cause for union discipline, especially where one union cannot supply a worker with regular employment opportunities, unless a member is actively engaged in trying to supplant one union by another."

The opinion expressed by the British Columbia Labour Relations Board in Coleman, *supra*, respecting the exercise of the unions' disciplinary power is relevant and this panel of the Board adopts it as its own:

"The power of discipline and the principle of majoritarian rule cannot be used by a union executive or its officers to silence the views of a minority or to take away the right of an individual member to dissent from the majority view. Each member of the union must have the right to stand for office, criticize the union and its officers, support political parties and express political beliefs of any persuasion, and to take a stand on any public issue which may

be directly in conflict with their own union's position, without the fear of reprisal or discipline.

Conversely, the union must have the ability to discipline for violations of its constitution and bylaws and to be able to deal with breaches of confidentiality, breaches of trust, corruption and destruction of property. ...

These are some of the difficult trade-offs within the trade union context between the rights of individuals and the rights of the majority."

(page 41)

The Saskatchewan Labour Relations Board adopted a much firmer approach and determined that employees may not be disciplined by their union for carrying on lawful raiding activities. (See Alcorn and Detwiller, supra.)

However, this Board has previously recognized in certain decisions that a union was entitled to expel a member unreservedly and unconditionally for engaging in raiding activities: see James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRB no. 492). This approach was adopted in other decisions: see Paul Horsley et al., supra; Vicky Olson et al. (1991), 85 di 177 (CLRB no. 881); and Mark Conlin (1994), 95 di 145; and 27 CLRBR (2d) 149 (CLRB no. 1088). However, while acknowledging that employees enjoyed the freedom of association provided for in section 8(1) of the Code, none of these decisions analyzed the union's authority to discipline members for taking part in lawful raiding activities, in light of the effect of the union's monopoly of representation on employees' rights and interests and of the search for a balance between those rights and interests, the approach which the Board is taking in this case.

In James Carbin, supra, which was the first decision in which the Board dealt with this question, Mr. Carbin had been expelled for engaging in raiding activities to displace the certified union, the International Association of Machinists, which he had

willingly joined. The Board found that the union could expel Mr. Carbin for attempting to change bargaining agents. In fact, the Board considered the situation and the consequences of this disciplinary action from the standpoint of the employer-employee relationship, that is to say that Mr. Carbin's expulsion did not change his employee status, since the collective agreement contained no closed shop clause that would have required Mr. Carbin to be a union member. Mr. Carbin's rights and interests were viewed solely from the standpoint of economic consequences, meaning that his expulsion from the union did not result in the loss of his employment. Therefore, the Board did not consider the effects of his loss of membership in the IAM, which remained the bargaining agent after the raiding campaign failed. In short, the Board did not find that the union's decision to expel Mr. Carbin had prevented him from exercising his freedom of association as provided for in section 8 of the Code in the context of the union's exclusivity of representation which, in our view, the union could not do on the basis of a provision in its constitution similar in nature to clause 8.02(f) of CUPW's constitution. Lastly, contrary to the reasoning adopted in that case, it is the Board's view that the act of willingly joining the certified union at one point, which had been Mr. Carbin's case 20 years earlier, cannot prevent a member from trying to displace the certified union while he was still a member on the ground that he had previously agreed to comply with the union's constitution which prohibited raiding and provided for expulsion in such cases. This reasoning is contrary to the Board's decision in Terry Matus, supra, where it was well established that an employee has the right to join more than one union and that a union's constitution prohibiting dual unionism is in itself discriminatory.

GENERAL CONCLUSION

Striking a balance between the rights, obligations and interests of employees and those of unions ensures compliance with the provisions of the Code. This decision proceeds from this objective.

FOR THESE REASONS, the Board:

ALLOWS Ms. Beaudet-Fortin's complaint;

FINDS that the union, as bargaining agent, acted in a discriminatory manner and violated sections 95(f) and (g) of the Code;

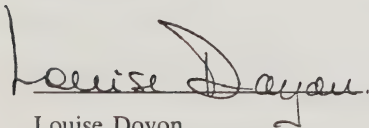
DECLARES that clause 8.02(f) of CUPW's constitution is discriminatory to the extent that it authorizes the expulsion of the complainant from its ranks for the sole reason that she engaged in raiding activities authorized by the Code;

DECLARES that clause 8.02(f) of CUPW's constitution does not apply in this case;

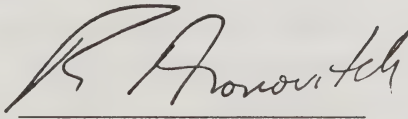
AND, pursuant to its powers conferred by section 99(1)(f) of the Code:

REQUIRES CUPW forthwith to rescind Ms. Beaudet-Fortin's expulsion and reinstate the complainant to its ranks retroactive to February 20, 1996, with all related benefits.

The Board appoints Ms. Suzanne Pichette, Regional Director and Registrar of the Montréal Office, or any other person whom she may name, to assist the parties in implementing this decision, if necessary. The Board will remain seized of any matter that may be raised at that time.



Louise Doyon
Vice-Chair



Roza Aronovitch
Member

SEPARATE REASONS OF MEMBER MARLEAU

I have read the majority's reasons for decision and I concur with their statement of the facts and the conclusion that those facts do not indicate that the union acted in a discriminatory manner with respect to the procedure it followed, or that the complainant was denied a fair and impartial hearing. However, I do not concur with the majority's conclusion that the union violated sections 95(f) and (g) of the Code. The majority reached that conclusion because the internal rule upon which the union relied in ordering the complainant's expulsion, namely article 8.02(f) of CUPW's constitution which authorizes a member's expulsion for engaging in raiding activities, is, in itself, discriminatory. In my view, the rule in question is not, in itself, discriminatory since it makes no distinction between persons or groups on prohibited grounds and is based on justifiable considerations. Furthermore, there is no direct causal link between the offence of raiding and expulsion, the choice of sanction being left to the union's disciplinary body. I consider that the problem lies instead in the union's application of its disciplinary standards in this case. In this regard, however, I concur with the majority's finding that the complaint must be allowed for the following reasons.

(1) Legitimacy of the Internal Rule in Question

To be discriminatory, a rule of a union's constitution must be based on considerations prohibited by law or it must establish unfair distinctions between persons or groups on unlawful, arbitrary or unreasonable grounds. Furthermore, the "discriminatory" nature of a disciplinary rule must be assessed in view of the considerable autonomy conferred upon trade unions in administering their internal affairs. As the Board stated in Paul Hewitt et al., July 31, 1975 (LD 9):

"... as any voluntary association, [a union] may properly discipline, suspend or expel its members. The provisions of the Code ... do not interfere with that right except insofar as they prohibit a trade union from so doing in a discriminatory manner or for prohibited motives or considerations. ..."

(page 2; excerpt cited and endorsed in Gerald Abbott (1977), 26 di 543; [1978] 1 Can LRBR 305; and 78 CLLC 16,127 (CLRB no. 114); and Gérard Cassista et al. (1978), 28 di 955; and [1979] 2 Can LRBR 149 (CLRB no. 161))

In the present case, the union's constitution provides that sanctions may be imposed on a member if he or she has committed one of the offences enumerated therein. Engaging in raiding activities against the union constitutes one of the prohibited offences (article 8.01 of the constitution). The constitution also provides for the sanctions which may be imposed on members, without specifying the situations in which one sanction rather than another should apply (article 8.02 of the constitution). The choice of sanction is left to the union's disciplinary body which determines the sanction in accordance with the circumstances of the case (article 8.25 of the constitution).

These provisions are not, in themselves, discriminatory because the rule providing that raiding is conduct liable to a sanction makes no distinction between persons or groups on unlawful, arbitrary or unreasonable grounds. Furthermore, the rule is not based on prohibited considerations, but rather on the union's legitimate objectives of protection.

Section 8 of the Code states that employees are free to join the trade union of their choice and to participate in its lawful activities. The Code also provides for certain mechanisms enabling employees to express their choice with respect to union representation and the identity of the organization that will be granted the power to represent them legally: certification, decertification and change of bargaining agent. However, the Code also grants trade unions a number of rights based on a twofold concern: that of encouraging the introduction of unions in the workplace and of

ensuring the expansion of union activities therein through the implementation of measures which are conducive to truly effective union intervention. It follows that employees' exercise of their recognized freedoms to join the trade union of their choice and to participate in its lawful activities is circumscribed by the mechanisms provided for in the Code and by the exercise of the rights conferred upon trade unions by law. For example, Parliament does not recognize an employee's right to avoid any form of involuntary association: it permits union security clauses (section 68) and compulsory union check-off provisions (section 70). Employee rights and freedoms are thus freely exercised in principle, but are subject to a legal framework with respect to their implementation.

Consequently, although employees are entitled under the Code to attempt to change bargaining agents at certain times, the Board recognizes that a union's legitimate need to protect its institutional interests and the collective interests of its members justifies the certified bargaining agent to protect itself from the harmful consequences of raids. It can do so by means of internal rules that provide a framework for and set limits on the conditions of membership for employees who have participated in raiding. A union may thus discipline its members for non-compliance with these rules. The legislation indeed recognizes that unions have collective interests to protect if they are to function as effective collective bargaining agents and democratic organizations capable of establishing a true balance of power with the employer (Fred J. Solly (1981), 43 di 29; [1981] 2 Can LRBR 245; and 81 CLLC 16,089 (CLRB no. 296), pages 44; 256-257; and 565-566).

Furthermore, while the purpose of sections 95(f) and (g) of the Code is to protect employees from arbitrary union conduct and, more specifically, from discriminatory treatment, those provisions do not preclude trade unions from including in their constitutions the sanction of temporary or permanent expulsion among the range of available penalties (see Fred J. Solly, *supra*) or from providing that raiding activities on behalf of a rival union may constitute an offence liable to such a sanction.

Moreover, section 95(e) of the Code clearly suggests this where it provides that no trade union shall:

"(e) require an employer to terminate the employment of an employee because the employee has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union; ..."

(emphasis added)

Based on the foregoing, it can be stated that the internal rule on which the union relied in this case in imposing the sanction is not in itself discriminatory and that in determining whether the union applied its disciplinary or membership rules in a discriminatory manner contrary to sections 95(f) and (g) of the Code, the Board's attention should focus on the union's exercise of its disciplinary power.

(2) Consequences of the Application of the Expulsion Rule in the Present Case

Inasmuch as the internal rule at issue is not, in itself, discriminatory, what can be said of the consequences of its application? When the Board finds, as in this case, that the member was not subject to discriminatory treatment on procedural grounds or to unequal application of the union's standards, it must clearly conclude that the union's membership and disciplinary rules were not applied in a discriminatory manner from a horizontal standpoint in that the complainant was not treated differently from other union members in similar situations. In the context of exclusive union representation, however, the question is nevertheless still unresolved because the Board must then also determine whether the union's rules were applied in a discriminatory manner from the vertical standpoint. There is vertical discrimination in this context when a certified union applies a rule of its constitution to derive an unwarranted advantage

from its function of exclusive representation at the expense of an employee's interests in order to alter, in its favour, the balance established by Parliament, which is essential to ensuring the consistent and effective operation of the labour relations system.

In assessing the discriminatory nature of the certified union's application of its disciplinary standards, the Board must consider not only the strict contractual perspective and the principle of free acceptance of the union's disciplinary power, but also the general economy of the labour relations system instituted under the Code and the resulting standards of public order that have the effect of setting aside the conventional standard.

The right to join more than one union and to participate in the unions' lawful activities contributes to public order as expressed in section 8 of the Code and in other statutory provisions which affirm the freedom of association. The practical application of this right is found in the mechanism that allows employees to attempt to replace the certified bargaining agent.

Moreover, the majority rule which gives trade unions the right to exclusively represent the employees of a bargaining unit and which justifies the latter's loss of their individual freedom to contract with their employer confers upon the certified bargaining agent a quasi-public role involving broad powers. These broad powers are granted to the union to enable it to defend the employees' interests more effectively vis-à-vis the employer. These powers are not granted to enable the union to promote its own interests at the expense of those of the employees it represents by using the powers derived from the exclusive representative function to prevent any expression of dissent which might compromise its position.

Consequently, while a member's participation in an attempt to displace the certified union may quite properly give rise to sanctions since the employee's action is then at odds with the union's collective and institutional interests, those sanctions, however, must not have the effect of reducing the mechanism enabling employees to change bargaining agents to a process devoid of any practical value. The certified union may not use its exclusive representation function to attempt to prevent employees from exercising the public interest rights they have under the Code. However, this is what occurs if the union imposes a sanction on a member who has engaged in raiding activities which allows no possible co-existence of the right to attempt to change bargaining agents with the right to participate in collective decisions which directly stem from exclusive union representation.

In the current legislative context, the logical corollary of the absolute nature of a certified union's legal authority of representation and of the compulsory union check-off, namely, the bargaining unit employees' right to a certain degree of participation in the collective decisions that will be binding on them if such decisions are supported by the majority of the employees concerned, such as whether to strike or ratify a collective agreement, is a right whose exercise depends upon membership in the trade union. Membership in the certified union is, thus, of paramount importance for employees, since it carries with it the right to participate in union activities or in industrial democracy to the extent defined in the organization's constitution. In CUPW's case, for example, union membership is required for employees to take part in a vote on union demands (article 6.16 of the constitution), in a strike vote (article 6.17 of the constitution) and in a vote to ratify a draft collective agreement (article 6.18 of the constitution). However, membership in the certified union also implies that employees will be subject to the union's constitution and to its disciplinary power.

In the context of exclusive union representation, the employees' acceptance of the restrictions set out by the certified union in its constitution is largely dictated by the employees' obligation to join the union in order to be entitled to a certain degree of participation in the decisions which stem from exclusive union representation. It follows, therefore, that this acceptance must be narrowly construed in so far as it relates to the exercise of employee rights recognized by the Code and which contribute to public order. The certified union controls and administers its members' right to take part in decisions which stem from the collective bargaining process. When it exercises its disciplinary power to limit the membership rights of employees because they engaged in raiding activities, the union must then consider the limited scope of the employees' acceptance of the restrictions contained in its constitution in so far as they relate to the employees' right to deal with their bargaining agent and to participate in union activities which stem directly from exclusive union representation. In this context, the absolute effect of the exclusive representation function imposes an obligation on the certified union to exercise its disciplinary powers in such a way as to minimize any potential infringement of its members' basic right to participation.

This means that although, from a contractual standpoint, the certified union can justifiably discipline, as it sees fit, its members for wrongdoings in accordance with its constitution, from the standpoint of the general economy of the labour relations system, it must also ensure that the measure taken does not cause greater harm than the situation which it intends to remedy. Thus, where the measure is intended to discipline members for exercising, pursuant to the Code's provisions, rights which are essential to maintaining the balance established by Parliament to ensure a coherent and effective operation of the system, there must be some proportionality between the certified bargaining agent's exercise of its disciplinary power and the union's interests so as to minimize the harmful consequences of the sanction on the employees' rights; the measure taken must serve a remedial function, not a punitive purpose. As the Board stated in Paul Horsley et al., (1991), 84 di 201; and 15 CLRBR (2d) 141

(CLRB no. 861), at pages 213; and 153, the sanction imposed by the union must bear a "fair and rational relationship" to the actual charges against the member. This obligation does not stem from the union's constitution, but from the legal structure of the general labour relations system.

The Code recognizes employees' interests in belonging to the certified union and in maintaining their membership status by prohibiting, in section 95, certain conduct and by refusing the certification of any union that applies discriminatory membership rules (section 25(2)). The approach taken by Parliament shows its intention to recognize and protect employees' interests in belonging to the certified union and in taking part in collective decisions which will have an effect on the determination of their working conditions. This protection can be found in the obligation imposed upon trade unions to meet certain standards of non-discrimination in applying their internal membership and disciplinary rules.

One of those standards requires that the certified union not exercise its disciplinary power in such a way as to obtain an unwarranted advantage from its representation function provided for in the Code to alter, in its favour, the balance established by Parliament between the interests of the employees and those of the union.

Such an approach is clearly more demanding of the unions than the approach that is limited to a fair application of the union standard viewed from a strictly contractual standpoint which the Board adopted in James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRB no. 492). However, it is justified by the quasi-public role that is bestowed upon trade unions and the absolute effect of the exclusive representation function which the bargaining agent exercises within the bargaining unit (on this point see P. Verge and G. Murray, Le droit et les syndicats (Sainte-Foy: Presses de l'Université Laval, 1991), page 214).

For employees who are members of the certified union, exercising their right to change bargaining agents under the Code necessarily entails violating the union's constitution. And yet, if the raiding attempt fails, membership in the certified union still remains of extreme value to those employees since they must be members of the certified union in order to participate in its collective decisions which may have a decisive impact on the determination of their conditions of employment.

In exercising its disciplinary power, a certified union must take this dilemma into consideration to ensure that the balance struck by the Code between the interests of the employee and those of the union is preserved. Implementing the collective bargaining system requires the will of the majority of a group of employees, and the same is true of the choice of the bargaining agent which will be granted the power to legally represent them. A certified bargaining agent, therefore, cannot use the broad powers it derives from its exclusive representation function under the Code to sanction, in a manner disproportionate to its legitimate need for protection, the right of the employees it represents to change bargaining agents. The interdependence of the recognized freedoms of every employee and the effectiveness of those freedoms must be preserved so as to maintain the balance established under the Code upon which the coherent and harmonious operation of the system depends. These freedoms cannot be reduced to superficial standards, to rules devoid of any practical value by an abusive use of the power which is derived from the bargaining agent's exclusive representation function. Depriving employees of the right to minimum participation, which necessarily results from the penalty of expulsion imposed for the sole reason that the employees engaged in lawful raiding activities, does not meet these requirements. The employees' right to fundamental participation has a social value that goes beyond the strictly contractual bounds of the relationship between members and the certified union. Accordingly, unless there exists no other way of achieving the union's objective of protection, the union cannot, by virtue of controlling the terms and conditions of the exercise of that basic right, heedlessly deprive employees of this

right of participation for the sole reason that they lawfully exercised their right to dissent.

In this case, the union had at its disposal a range of measures that would have enabled it to achieve its objectives of protection while maintaining the complainant's right to fundamental participation as a bargaining unit member. It preferred to expel the complainant from the union unreservedly and unconditionally for the sole reason that she had, pursuant to the Code's provisions, engaged in lawful raiding activities during the authorized period.

Although unreserved and unconditional expulsion could be imposed in accordance with the union's constitution, from the standpoint of the general economy of the labour relations system, it was a sanction "that bore no fair and rational relationship" to the protection of the union's legitimate interests. Indeed, while the union could quite properly discipline the complainant for her raiding activities on the grounds that such activities undermined the bargaining agent's integrity, it could not deprive her of her right to participate in collective bargaining decisions which directly stem from exclusive union representation nor could it deprive her of her right to deal with her exclusive representative for the sole reason that she had, pursuant to the Code's provisions, exercised her right to attempt to change bargaining agents. In so acting, the union derived an unwarranted advantage from the powers conferred upon it by the exclusive representation function to alter, in its favour, the balance established between the interests of the employees and those of the union. Such a sanction, therefore, did not have the attributes of a measure essentially designed to protect the union's institutional rights and the collective interests of its members, but rather those of a measure of reprisal intended to punish the employee for exercising rights under the Code and to deter other union members in the bargaining unit from exercising their right to attempt to change bargaining agents.

Consequently, I conclude that, in disciplining the complainant as it did, the union applied its disciplinary standards and membership rules in a discriminatory manner contrary to sections 95(f) and (g) of the Code. For these reasons, I find, like my colleagues, that the complaint should be allowed and the complainant's expulsion rescinded.



Véronique Marleau
Member

information

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Summary

Public Service Alliance of Canada, *applicant*,
City of Saskatoon, *employer*, and International
Association of Fire Fighters, Local 80,
intervenor.

Board File: 17568
CLRB/CCRT Decision no. 1217
December 23, 1997

The Public Service Alliance of Canada (PSAC) filed an application, pursuant to sections 24 and 47(2) of the Code, to represent the fire fighters involved in providing emergency response services (ERS) at the John G. Diefenbaker Airport in Saskatoon.

The fire fighters were formerly employed by Transport Canada and are now employees of the City of Saskatoon consequent upon the take-over of the ERS by the City pursuant to a service contract concluded with the Transport Canada.

The City and the intervenor, the International Association of Fire Fighters, Local no. 80 (the bargaining agent of the fire fighters employed by the City), opposed the application on constitutional jurisdiction grounds.

The Board found that it has constitutional jurisdiction to entertain the application for certification filed by PSAC to represent the fire fighters employed by the City that are engaged in providing ERS at the Saskatoon

Résumé

Alliance de la Fonction publique du Canada, *requérante*, Ville de Saskatoon, *employeur*, et Association internationale des pompiers, section locale 80, *intervenante*.

Dossier du Conseil: 17568
CLRB/CCRT Décision n° x1217
le 23 décembre 1997

L'Alliance de la Fonction publique du Canada (AFPC) a présenté, en vertu de l'article 24 et du paragraphe 47(2) du Code, une demande en vue de représenter les pompiers affectés aux services d'intervention d'urgence (SIU) à l'Aéroport John G. Diefenbaker, à Saskatoon.

Les pompiers étaient auparavant employés par Transports Canada et sont maintenant des employés de la ville de Saskatoon qui a pris en charge les SIU aux termes d'un contrat de services conclu avec le Transports Canada.

La ville et l'intervenante, l'Association internationale des pompiers, section locale n° 80 (l'agent négociateur des pompiers employés par la ville), ont contesté la demande pour des motifs de compétence constitutionnelle.

Le Conseil estime qu'il a la compétence constitutionnelle pour instruire la demande d'accréditation présentée par l'AFPC en vue de représenter les pompiers employés par la ville et affectés aux SIU à l'aéroport de Saskatoon. Il juge que la Division de

Airport. It determined that the Airport Division of the City's Fire Department - involved in providing ERS - is a severable part from the remainder of the Fire Department and therefore, an identifiable subsidiary operation for the purpose of making a constitutional determination. Applying the constitutional principles found in case law, the Board concluded that the activity of providing ERS forms an integral part of Parliament's jurisdiction over Aeronautics (section 2(e) of the Code).

The Board also held that section 47 applies to the present case. For section 47 to apply, it is not necessary that the City be a federally regulated business prior to the transfer. The City's newly created Airport Division, in agreeing to provide ERS at the Airport, began its operation as a federal business. This suffices for the purposes of the application of section 47.

The Board determined that a unit composed of all fire fighters providing ERS at the Airport is appropriate for collective bargaining.

l'aéroport du Service des incendies de la ville - dont relève la prestation de SIU - est une partie séparable du reste du Service des incendies et, par conséquent, une activité subsidiaire identifiable pour les besoins de rendre une décision constitutionnelle. S'appuyant sur les principes constitutionnels que renferme la jurisprudence, le Conseil conclut que la prestation de SIU relève intégralement de la compétence du Parlement au chapitre de l'aéronautique (alinéa 2e) du Code).

En outre, le Conseil juge que l'article 47 s'applique en l'espèce. L'application de l'article 47 n'exige pas que la ville soit une entreprise de compétence fédérale avant la cession. En acceptant de fournir des SIU à l'aéroport, la nouvelle Division de l'aéroport de la ville a commencé à fonctionner à titre d'entreprise fédérale. Cela suffit pour les besoins de l'application de l'article 47.

Le Conseil estime qu'une unité composée de tous les pompiers affectés aux SIU à l'aéroport est habile à négocier collectivement.

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Reasons for decision

Public Service Alliance of Canada,

applicant,

City of Saskatoon,

employer,

and

International Association of Fire Fighters,
Local 80,

intervenor.

Board File: 17568
CLRB/CCRT Decision no. 1217
December 23, 1997

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Ms. Roza Aronovitch and Mr. David Gourdeau, Members.

Appearances:

Mr. Andrew J. Raven, for the applicant;

Mrs. Theresa Dust, for the employer; and

Mr. Neil McLeod, for the intervenor.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The Public Service Alliance of Canada ("PSAC") filed an application, pursuant to sections 24 and 47(2) of the *Canada Labour Code*, seeking to represent a group of fire fighters working at the John G. Diefenbaker Airport (the "Airport") in Saskatoon.

The fire fighters in question were formerly employed by Transport Canada and are now employees of the City of Saskatoon ("the City" or "Saskatoon") pursuant to the terms of a service contract entered into between Transport Canada and the City.

The City opposes the application on jurisdictional grounds. It argues that the Board does not have constitutional jurisdiction to deal with the application in so far as Saskatoon, in its operation of the Airport, does not operate a federal work, undertaking or business. As well, the City and the Intervenor, the International Association of Fire Fighters, Local no. 80 ("the IAFF"), raised the issue of the applicability of the newly amended section 47 of the Code to the facts of the present case.

II

The John G. Diefenbaker Airport is currently owned and operated by Transport Canada. The City and Transport Canada entered into a five-year service contract in June 1996 for the provision of emergency response services ("ERS") at the Airport. Pursuant to that contract, the City agreed to provide all crash/rescue fire fighting services that may be required at the Airport. The contract provides for renewal for a further five-year term. Transport Canada may however terminate the contract at any time by giving a six-month notice.

Prior to August 1, 1996, Transport Canada provided the emergency response services at the Airport and the employees assigned to ERS were included in a bargaining unit represented by PSAC and certified under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35.

When the City took over the ERS unit at the Airport, 13 employees were working at the Airport fire hall. In accordance with the terms of the service contract, these employees were all offered employment with the City of Saskatoon Fire Department and they all accepted.

Saskatoon's fire fighters are already represented by the IAFF, pursuant to a certification order granted under provincial legislation. The IAFF was granted intervenor status in the present proceedings. Since the City's takeover of ERS, the former Transport Canada employees have become members of the IAFF, and the City has been deducting the required union dues which it remits to the IAFF.

At the commencement of the hearing, the parties submitted the following agreed statement of facts:

- "1. The City of Saskatoon is a city with a population of approximately 200,000 people. The City of Saskatoon is a municipal corporation pursuant to The Urban Municipality Act, 1984, S.S. 1983-84, c. U-11 (the 'City'). According to that Act, the City may establish a fire department. The City did establish a fire department named The Fire and Protective Services Department (the 'Department'). The Department has approximately 282 employees, approximately 270 of those are unionized firefighters who are members of the International Association of Firefighters, Local 80 ('IAFF, Local 80'). The balance are made up of the Chief and seven exempt assistant chief positions and four non-firefighter support staff who are not members of IAFF, Local 80.*
- 2. The Public Service Alliance of Canada ('PSAC') is bargaining agent for over 150,000 public service workers. PSAC was certified as the bargaining agent for all airport firefighters excluding supervisors employed by Transport Canada on August 2, 1967. On the same date, PSAC was also certified as bargaining agent for all supervisor firefighters employed by Transport Canada.*
- 3. IAFF, Local 80 was certified as bargaining agent for the Department firefighters on or about March 11, 1946.*
- 4. All emergency response services are now provided to the Airport by the Department pursuant to an Agreement made between Her Majesty the Queen in Right of Canada represented by the Minister of Transport and the City. The Agreement commenced August 1, 1996 and is for a period of five years. Along with the Agreement, the City leased a firehall located at the Airport and two emergency response vehicles (foam trucks).*

5. *That in anticipation of the Agreement, 13 Transport Canada employees terminated their employment with Transport Canada and became employees of the City. The City made an offer of employment to each of them.*
6. *At this time, internal Transport Canada policies are being replaced by the new Federal Canadian Aviation Regulations. At this time, the document applicable to aircraft rescue and firefighting remains Transport Canada Policy document TP-3660. The new Federal Regulation for aircraft rescue and firefighting is scheduled to be Gazetted at the end of April, 1997.*
7. *The Airport is an ERS Category B level 6 airport according to current Transport Canada policy. As such, it is required by Transport Canada policy to have ERS vehicles with a certain foam capability manned 17 hours per day with a three-minute response time to a certain physical area of the Airport.*
8. *As a result of the Agreement, the Department created an Airport Division of seven jobs in three positions as follows:*
 - one Crash Rescue Coordinator working a day shift;*
 - three Crash Rescue Shift Supervisors, one for each 18-hour shift; and*
 - three Crash Rescue Firefighters, one for each 18-hour shift."*

As a signatory to the *Convention on International Civil Aviation*, the federal government must observe the minimum standards set out by the International Civil Aviation Organization (ICAO) regarding ERS. The Agreement entered into between Transport Canada and the City requires the latter to observe all applicable acts and regulations, including the *Aeronautics Act*, R.S.C., c. A-2.

In the Scope of Work Agreement, the parties agreed that the City must meet Transport Canada objectives in providing aircraft ERS. The objectives of an emergency response crew are described in Transport Canada policy TP 3660 (September 1994) as follows:

"3.1 *The primary objective of the ERS (in conjunction with scheduled passenger commercial air carrier activities), is to prevent, control, or extinguish fire involving or adjacent to an aircraft, for the purpose of providing fuselage integrity, and an evacuation route from the aircraft for its occupants in the event of an aircraft accident/incident at or near an airport.*

ERS shall assist, to the extent possible within their available capabilities, the flight crew in the evacuation of passengers. If the flight crew are unable, for whatever reason possible, to open usable emergency exits, to the extent possible, ERS personnel will, by whatever means necessary, force entry into the aircraft and provide assistance in the evacuation/rescue of the occupants, once the fire routes have been established and it is safe to do so.

3.2 *The secondary objective is to preserve properly by containing or extinguishing, where practical, any fire resulting from an aircraft accident or incident.*

3.3 *The operational objective of the ERS shall be to achieve a response time not exceeding three minutes when the aircraft accident/incident occurs on the aircraft movement area, (see Section 10.3) and as expeditiously as possible to all other accidents/incidents within the CFAA or airport boundary. ..."*

In addition to the above objectives, the ERS standards - developed by Transport Canada - are also contained in its policy TP 3660. With the privatization of airports, and the consequent withdrawal of Transport Canada as the administrator, it became imperative that the TP 3660 policy become regulation to ensure compliance by privatized airports. On April 19, 1997, the proposed *Regulations amending the Canadian Aviation Regulations (Part III)* were published in the Canada Gazette (Part I). Their purpose is described as follows:

"Part III, Subpart 303, of the Canadian Aviation Regulations (CARs) 'Aircraft Fire Fighting at Airports and Aerodromes'

specifies, in its attached schedule, the 28 airports which must provide on-site aircraft fire-fighting services and the level of protection which must be provided by the airport operator. The regulation also sets out the basic requirements with respect to the training, testing and resources in order to provide an effective capability for dealing with aircraft emergencies. The required level of protection is consistent with the recommended practices published by the International Civil Aviation Organization (ICAO). The regulation will ensure that the largest and busiest Canadian airports will continue to provide fire-fighting services that meet the current Transport Canada standard. ..."

(Canada Gazette, Part I, Vol. 131, No. 16, April 19, 1997, page 1271)

On December 1, 1997 the proposed Regulations came into force (Canada Gazette, Part II, December 10, 1997). It is undisputed that, in order to function as a Category B Level 6 Airport and maintain its certificate to operate, the Airport must provide the appropriate level of ERS contained in the Regulations which reflect the TP 3660 policy.

The agreement concluded with Transport Canada specifically requires that the City maintain established Category B Level of ERS for 18 hours a day, with a minimum of two dedicated fire fighters available for immediate response. This means that the Airport must, in addition, maintain as extinguishing agents 7900 litres of water for the production of aqueous film forming foam and 225 kilograms of dry chemical.

Following the agreement with Transport Canada, the City restructured its fire-fighting operations in the Airport area of Saskatoon. The former Airport fire hall is now designated as Fire Hall No. 8 within the City of Saskatoon Fire Department. For administrative purposes, the Department created an Airport Division composed of employees responsible for all fire fighting and related services required at the Airport. Four trucks (foam trucks and rapid intervention vehicles) are currently stationed at the Fire Hall No. 8 and service the Airport's needs.

The crew assigned to Fire Hall No. 8 is composed of one crash rescue coordinator, three crash rescue shift supervisors and three crash rescue fire fighters. Except for the crash coordinator who works regular hours (42 hours/week), the other members of the crew work 18-hour shifts: one 18-hour day, followed by one day off; then three 18-hour days followed by four days off. When they are not dealing with emergency situations, the fire fighters are engaged in ongoing training as required pursuant to the Fire Fighter Certification Program (Exhibit no.22, section 3.4). Although the whole crew is stationed at the Airport, the fire fighters may rotate to other positions within the Fire Department. The shift supervisors have elected to remain solely with the Airport Division.

The basic skills required for structural fire fighting and crash/rescue fire fighting are the same; however, a special expertise is required for aircraft fire fighting. This is so mainly because the environment in which the airport fire fighters operate is very different: there are fewer exits, less room to manoeuvre and less time to save lives. Airport fire fighters and structural fire fighters are all trained in accordance with the NFPA (National Fire Protection Association) professional standards. The standard for airport fire fighter professional qualifications is contained in NFPA 1003 and the standard for structural fire fighter professional qualifications is contained in NFPA 1001. The latter is a prerequisite to certification level NFPA 1003 (Article 1-3.1).

Although the agreement provides for the takeover of ERS at the Airport, all structural fire fighting and related services at the Airport have always been - and remain - the City's responsibility. As well, prior to the agreement with Transport Canada, the City provided back-up and rescue services with respect to aircraft crash/rescue pursuant to a Memorandum of Understanding between Transport Canada and the City. Back-up troops are deployed, when required, as follows: one engine and rescue unit (six fire fighters) is dispatched within 6 minutes, a second back-up engine and rescue unit is dispatched within 8 minutes, and a third engine and rescue unit is dispatched within 12 minutes. In the City's view, the response for back-up services is faster and more integrated since the City's takeover of ERS.

Finally, the evidence disclosed that two specific flights occasionally landed after ERS operating hours. In those cases, should it wish to have ERS available outside the hours required by the policy, the airline is charged accordingly by the Airport. Another circumstance was mentioned where a flight failed to leave the Airport because no ERS were available. Both of the above situations were clearly exceptional.

III

PSAC'S POSITION

PSAC submits that ERS are an integral and essential part of the Airport, a core federal undertaking. In its submissions, the usual, continuous and habitual activities of the Airport Division of the Saskatoon Fire Department are essential to the Airport's activities since, simply put, it could not function without them. Transport Canada policy TP 3660 - which was about to become regulations - demonstrates that without the required ERS on site, the Airport can neither function nor be certified to operate. Moreover, it argues that to conclude that ERS fall within provincial jurisdiction would mean that the Regulations would be *ultra vires* of Parliament's authority.

According to PSAC, it is not necessary that the **entire** Saskatoon Fire Department be essential to the operation of the core federal undertaking to conclude that the ERS division comes under federal jurisdiction. It contends that the Airport Division is severable from the rest of the Fire Department's activities and that the employees concerned are easily identified.

THE CITY'S POSITION

The City argues that the Fire Department as a whole is the undertaking that should be considered as the "subsidiary operation" in applying the constitutional test set out

in Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115 (Northern Telecom no. 1).

It submits that since all the operations of the Fire Department, including the Airport Division, are fully integrated, the Airport Division therefore cannot be considered as a subsidiary operation on its own. Because of the nature of fire-fighting activity, all of the Fire Department - including ERS - must come under provincial jurisdiction as part of a single and unseverable operation.

Furthermore, the City submits that fire fighting services for aircraft crash/rescue situations are no different from fire fighting services for other emergency situations. It requires essentially the same basic skills and the service is delivered in essentially the same way.

Finally, it submits that there is no functional integration between ERS and the Airport whereas a functional integration of the Airport Division with the rest of the Fire Department is apparent. The City relies on this integration, the shared responsibilities, the mobility requirements and the community of interest between fire fighters at the Airport and its remaining fire fighters to ensure efficient and immediate service.

On the basis of the foregoing, the City submits that its Airport Division is not a severable business subject to the Code and that the Board therefore lacks jurisdiction to deal with the application.

THE IAFF'S POSITION

The intervenor IAFF generally accepts the City's submissions and argues that ERS fall within provincial jurisdiction. According to the IAFF, the ERS division is no longer a dedicated unit to the Airport. Rather, the IAFF submits that the ERS division is now integrated with the rest of the Fire Department and that is sufficient to conclude that it now falls within provincial jurisdiction.

IV

The issues to be determined are clear: (1) do the emergency response services provided by the City to the Airport fall within federal jurisdiction and the ambit of the *Canada Labour Code*; and, if so, (2) does section 47 apply in the present situation.

V

The Board's jurisdiction over the labour relations of a federal work, undertaking or business is described in section 4 of the *Code*:

"4. This part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

The relevant definition of "federal work, undertaking or business" reads as follows:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(e) aerodromes, aircraft or a line of air transportation, ..."

It has long been recognized that primary constitutional competence over labour relations falls *prima facie* within the exclusive jurisdiction of provincial legislatures

pursuant to "*Property and Civil Rights in the Province*" (section 92(13) of the *Constitution Act, 1867*); see Toronto Electric Commissioners v. Snider et al., [1925] 2 D.L.R. 5. This presumption in favour of provincial jurisdiction has been reiterated on many occasions by the Supreme Court of Canada; see, inter alia, Four B Manufacturing Limited v. United Garment Workers of America, [1980] 1 S.C.R. 1031, page 1045; and Northern Telecom no. 1, *supra*. As a general principle, fire fighting is *per se* an activity that falls within provincial jurisdiction. Consequently, the provision of ERS to an airport is not a federal undertaking in and of itself.

However, as an exception to this principle, the labour relations of a work, undertaking or business may fall within federal jurisdiction if it is established that it forms an integral part of Parliament's competence in another area; see Reference Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529; Construction Montcalm Inc. v. Minimum Wage Commission et al., [1979] 1 S.C.R. 754, page 768; and Bell Canada v. Quebec (Commission de la santé et sécurité du travail), [1988] 1 S.C.R. 749, pages 761-762. In the present case, it is common ground that a core federal undertaking exists, i.e. the Airport, which may provide the basis for the Board's jurisdiction if it is determined that ERS form an integral part of the Airport's operations.

Aeronautics falls within Parliament's jurisdiction by virtue of its peace, order and good government power (section 91 of the *Constitution Act, 1867*); see Reference re Aeronautics in Canada, [1932] A.C. 54; and Johannesson v. The Rural Municipality of West St. Paul, [1952] 1 S.C.R. 292. Therefore, the only issue to be examined is whether the Airport Division of the City's Fire Department is an identifiable subsidiary operation that forms an integral part of the Airport, a core federal undertaking engaged in aeronautics.

In order to make that determination, the Board must first identify the subsidiary operation upon which the core federal undertaking may be dependent. The PSAC submits that the Airport Division is severable from the rest of the City's Fire

Department. The City and the IAFF argue that the Airport Division is not severable from the rest of the Fire Department and that the City's entire Fire Department must be considered as the "subsidiary operation" for constitutional purposes.

In our view - based on the following: the organization of the work place, the assets and equipment used, the employees' functions, the specialized nature of their work, and the direction and control of work at the management level - the Airport Division involved in providing ERS is a severable part of the City's Fire Department.

The Airport Division constitutes a separate administrative division within the City's Fire Department. It was established following the transfer of ERS to the City for the specific purpose of providing these specialized services to the Airport. A designated Fire Hall is located at the Airport where four trucks are stationed to service the ERS division's needs. The ERS equipment currently used is the same equipment that was in place prior to the takeover.

The majority of the employees working in this Division are exclusively assigned to ERS. They are all trained in accordance with the specific standards for aircraft crash/rescue fire fighting and they are easily identifiable. As well, a coordinator is assigned exclusively to coordinate the work of the shift supervisors and the fire fighters engaged in providing ERS.

The City relies on the integration of the back-up services, since the takeover, to submit that all fire-fighting services are now integrated as a whole within the Fire Department. In our view, this contention is not supported by the evidence. The provision of back-up services has not changed to such an extent, since the takeover, to lead to the conclusion that they are unseverable from the Airport Division. The City's fire fighters provided similar back-up services prior to the takeover and continue to do so for the current ERS crews in essentially the same fashion.

Although both are engaged in fire fighting, the Airport Division is a divisible operation from the remainder of the Fire Department. Its activities are not sufficiently integrated with those of the rest of the Fire Department to conclude that the Fire Department should be considered as a single indivisible undertaking; Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRB no. 792), pages 122 and 148. Consequently, we conclude that the Airport Division is the identifiable subsidiary operation for the purpose of the constitutional determination.

VI

The fact that the City is the employer of the employees concerned does not preclude a finding that it is a "*federal undertaking*" within the meaning of section 2 of the Code. As was stated by the Supreme Court of Canada in Canada Labour Relations Board et al. v. City of Yellowknife, [1977] 2 S.C.R. 729; and Re City of Kelowna and Canadian Union of Public Employees, Local no. 338 (1974), 42 D.L.R. (3d) 754 (B.C.S.C.), jurisdiction depends on the legislative authority over the operation and not on the employer's identity.

The issue of the constitutional jurisdiction over ERS at an airport has never been discussed in the case law. Although precedents of certifications exist for fire fighters employed by various cities to work within ERS units at an airport (for example, Cranbrook, Kelowna and Vancouver Airports), no reasoning was set forth to support the determinations made and no consistent principle emerged from these precedents.

In order to determine whether a subsidiary undertaking falls within federal jurisdiction, tribunals apply a functional test and examine the nature of the business as a "going concern" without regard to exceptional or occasional factors; Construction Montcalm Inc. v. Minimum Wage Commission, *supra*, page 769; CLRB v. City of Yellowknife, *supra*, page 736; and Northern Telecom no. 1, *supra*, page 132. They then make a determination regarding the relationship between the subsidiary operation

and the core federal undertaking. If that relationship is found to be integral, vital or essential, the subsidiary operation will be found to fall within Parliament's jurisdiction. In United Transportation Union v. Central Western Railway Corporation [1990] 3 S.C.R. 1112, page 1142, the Supreme Court of Canada specified that the effective performance of the core federal undertaking's business must be dependent upon the services of the subsidiary operations in order to find that the latter comes under federal jurisdiction.

In arriving at the above broad conclusions, a tribunal is required to focus on certain "constitutional facts" that serve to shed light on the constitutional issue. The Supreme Court has provided a "roadmap" to that effect in Northern Telecom no.1, supra:

"On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of 'constitutional facts', facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:

(1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;

(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;

(3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;

(4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system."

(page 135)

The above principles are intended to be applied in a flexible fashion in assessing the facts of each particular case; see United Transportation Union v. Central Western

Railway Corporation, supra, pages 1139-1140; and Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225, page 258. In short, using the broad principles set out above, there must be a sufficient nexus between the core federal undertaking and the subsidiary operation to justify that the latter falls within federal jurisdiction.

In applying this test to the facts of the present case, we must ask the following question: what is the nature of the activities of the Airport Division of the Fire Department, that is, its purpose, role and *raison d'être*? Simply put, the City's Airport Division provides all fire-fighting services required in airplane crash/rescue situations near the Airport. Its primary mandate is to save lives in the event of aircraft accidents and participate with the flight crew in the evacuation of passengers. This mandate is therefore clearly linked with the passengers' and crews' security and safety. As described in Transport Canada policy TP 3660, the main objective of emergency response services

"is to prevent, control, or extinguish fire involving or adjacent to an aircraft, for the purpose of providing fuselage integrity, and an evacuation route from the aircraft for its occupants in the event of an aircraft accident/incident at or near an airport."

Looking at the second factor enunciated in Northern Telecom no. 1, supra, there is no doubt that in this case, there is no corporate relationship between the City's Airport Fire Division and the Airport, which is owned and operated by the federal government. Although relevant, this criterion has been found not to be determinant of the constitutional finding, in that separate ownership does not modify the level of integration that may exist between two undertakings; see Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra, page 265; United Transportation Union v. Central Western Railway Corporation, supra, page 1131; and Northern Telecom no. 1, supra, page 133.

With respect to the third aspect of the test, it is clear that the Airport Division's very *raison d'être* is to service the Airport and its customers, i.e. the airline companies, in ensuring the safety of on-board passengers and crews in accordance with Canada's obligations under international treaties and the relevant Regulations. The ERS Division has no other clients but the Airport.

The last factor of the four-fold test is at the heart of the relationship between the core federal undertaking and the subsidiary operation under consideration. It requires a physical and operational connection, i.e. a nexus to link the enterprise in question with Parliament's primary competence over "*aerodromes, aircraft or a line of air transportation*". In the present case, the most germane element in that regard is the Airport's obligation to provide the appropriate level of ERS in order to maintain its license and to operate. The Airport, as an ERS Category B level 6, must comply with Transport Canada policy TP 3660 - now converted into regulations pursuant to the *Aeronautics Act*. By virtue of these regulations, the Airport, if it wishes to maintain its license, must ensure that ERS are available 18 hours a day, with a three-minute response time. With that requirement, clearly the Airport is dependent on the services of the subsidiary operation.

In light of the same, it is difficult to argue that ERS are not essential, vital or integral to the Airport. Federal jurisdiction over aeronautics - under the peace, order and good government power (section 91 of the Constitution Act, 1867) - is based, *inter alia*, on Parliament's intent to regulate health, safety and security matters in the field of aeronautics. Many provisions of the *Aeronautics Act* (see in particular sections 4.7, 4.9 and 5), which enable the federal government to make regulations for the purpose of protecting passengers, crew members, aircraft and aerodromes, are proof of that interest; see Ontario Public Service Employees Union v. Ontario (1994), 16 O.R. (3d) 735. The mandate of the Airport Division to provide ERS relates primarily to passengers' and crew members' safety and, as such, it is clearly linked to Parliament's regulatory jurisdiction over aeronautics. Although not determinative, the fact that the relevant Transport Canada policy dealing with ERS has become regulations under the

Aeronautics Act further illustrates the federal government's paramountcy in that field. By virtue of those regulations, Parliament will be assured that its standards - particularly those it has adopted by virtue of international treaties - will be respected by the ERS units at all appropriate airports. To conclude otherwise would mean that the newly enacted Regulations are *ultra vires* of Parliament's constitutional jurisdiction.

The essential and vital nature of ERS as it relates to Parliament's core jurisdiction over aeronautics is easily apparent when compared with other cases where the activities at an airport were not sufficiently connected to the core activity of "*aerodromes, aircraft or a line of air transportation*". For example, it has been determined that the operation of limousine or taxi services to the airport (Re Colonial Coach Lines Ltd. et al. and Ontario Highway Transport Board et al. (1967), 2 O.R. 25 (H.C.), affirmed (1967) 63 D.L.R. (2d) 198 (Ont.C.A.); Murray Hill Limousine Service Limited v. Baton et al., [1965] B.R. 77; a parking lot on airport premises (Toronto Auto Parks (Airport) Limited, [1978] OLRB Rep. July 682)); a catering business for airlines (Baron W. Lewers (1982), 48 di 83; and 82 CLLC 16,179 (CLRB no. 372)); and porter services at an airport (Allcap Baggage Services Inc. (1990), 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778)), were not sufficiently related to the field of aeronautics to bring them within federal jurisdiction. As stated by the Board in Baron W. Lewers, *supra*, federal authority did not need to extend that far to effectively regulate the field of aeronautics.

In contrast, activities such as the operation of runway maintenance (Re City of Kelowna, *supra*), the business of servicing, maintaining, inspecting, modifying, repairing, refuelling and certifying aircraft (Butler Aviation of Canada Limited v. International Association of Machinists and Aerospace Workers), [1975] F.C. 590 (C.A.); Re Field Aviation Co. Ltd. and International Association of Machinists and Aerospace Workers, Local Lodge 1579 (1974), 45 D.L.R. (3d) 751 (Alta. S.C.); Innotech Aviation Limited (1993), 92 di 62 (CLRB no. 1018); E.S.F. Limited, doing business as Esso Aviat (1992), 88 di 185 (CLRB no. 949); and Selkirk College

(1995), no. B17/95, January 20, 1995 (BCLRB), and the business of servicing and certifying avionic equipment (black boxes) (North Canada Air Ltd. and Norcanair Electronics Ltd. (1979), 38 di 168; and [1980] 1 Can LRBR 535 (CLRB no. 222)), have been found to be vital and essential to Parliament's jurisdiction over aeronautics. Similarly, it was held that airport security services such as pre-boarding screening and frisking of passengers, fell within federal jurisdiction (Pinkerton's of Canada Ltd. (1990), 82 di 18; and 90 CLLC 16,061 (CLRB no. 820)). Finally, it is worth noting that the activity of air traffic control, which was recently privatized by virtue of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20, also falls within federal jurisdiction because it is an integral part of Parliament's control over aeronautics.

In the present case, there would simply be no undertaking at the Airport without the City providing the level of ERS as *per* its obligations initially via Transport Canada policy TP 3660 and currently pursuant to the Regulations. The integration of the ERS unit and the Airport is dramatically more than a physical connection and mutually beneficial commercial relationship. The very existence of the Airport, as an international aerodrome, depends on the availability of ERS during operating hours.

The fact that some flights have on occasion landed while these services were not available does not change the nature of the ERS business nor does it change the fact that these services are essential to the Airport's ability to function in accordance with the federal government's requirement. What is critical in making a constitutional determination are the normal and habitual activities of the undertaking, not the exceptional or casual factors, exhibited on rare occasions. In the same vein, the fact that some employees working within the Airport Division also occasionally engage in structural fire fighting outside the Airport does not prevent them from being subject to the Code. As was stated by Justice Ritchie of the Supreme Court of Canada in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178:

"...there is, in my opinion, nothing in that case [Stevedores case] which decided that exclusive employment upon or in connection with a federal work is a necessary prerequisite to inclusion in the class of employees designated by s. 108(1) [now section 3 of the Code]."

...

(pages 187-188)

The facts, examined in light of the applicable constitutional principles, lead us to conclude that ERS form an integral part of Parliament's jurisdiction over "aerodromes, aircraft or a line of air transportation" (section 2 of the Code). The evidence clearly showed that these services are vital and essential to the Airport and that the latter could not operate without them as reflected by the recently enacted Regulations.

For the foregoing reasons, we conclude that the Airport Division of the City's Fire Department forms a vital and essential part of the Saskatoon Airport and therefore falls within the exclusive jurisdiction of the Canada Labour Code.

From a labour relations perspective, it may well have been preferable for all City fire fighters to be subject to the same legislation and be part of the same bargaining unit or, at a minimum, represented by the same bargaining agent. However, considerations such as administrative inconvenience and efficiency are not relevant to a constitutional determination. The Supreme Court of Canada in Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327, stated:

"Finally there is the argument based on inconvenience. Bifurcating legislative power over labour relations in Ontario Hydro, a single enterprise, would, it is said, create practical difficulties. Two sets of rules would apply to different employees and, of course, there is the difficulty of drawing the line between federal matters and provincial matters. These problems are not really new. The interrelationship between Parliament's power over federal works and closely related provincial activity has always raised practical

difficulties. ... Various techniques of administrative inter-delegation have been developed to deal with problems of conjoint interest following upon the case of Winner, supra. If the problems here are sufficiently acute, and Parliament deems it appropriate to do so, resort could be had to such techniques."

(pages 374-375)

VII

The newly amended section 47 of the Code reads as follows:

"47.(1) Where the name of any portion of the public service of Canada specified from time to time in Part I or II of Schedule I to the Public Service Staff Relations Act is deleted and that portion of the public service of Canada is established as or becomes a part of a corporation or business to which this Part applies, or where a portion of the public service of Canada included in a portion of the public service of Canada so specified in Part I or II of Schedule I to that Act is severed from the portion in which it was included and established as or becomes a part of such a corporation or business,

(a) a collective agreement or arbitral award that applies to any employees in that portion of the public service of Canada and that is in force at the time the portion of the public service of Canada is established as or becomes a part of such a corporation or business continues in force, subject to subsections (3) to (7), until its term expires; and

(b) the Public Service Staff Relations Act applies in all respects to the interpretation and application of the collective agreement or arbitral award.

(2) A trade union may apply to the Board for certification as the bargaining agent for the employees affected by a collective agreement or arbitral award referred to in subsection (1), but may so apply only during a period in which an application for certification of a trade union is authorized to be made under section 24.

(3) *Where the employees in a portion of the public service of Canada that is established as or becomes a part of a corporation or business to which this Part applies are bound by a collective agreement or arbitral award, the corporation or business, as employer of the employees, or any bargaining agent affected by the change in employment, may, during the period beginning on the one hundred and twentieth day and ending on the one hundred and fiftieth day after the date on which the portion of the public service of Canada is established as or becomes a part of the corporation or business, apply to the Board for an order determining the matters referred to in subsection (4).*

(4) *Where an application is made under subsection (3) by a corporation or business or bargaining agent, the Board, by order, shall*

(a) determine whether the employees of the corporation or business who are bound by any collective agreement or arbitral award constitute one or more units appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) in respect of each collective agreement or arbitral award that applies to employees of the corporation or business,

(i) determine whether the collective agreement or arbitral award shall remain in force, and

(ii) if the collective agreement or arbitral award is to remain in force, determine whether it shall remain in force until the expiration of its term or expire on such earlier date as the Board may fix.

(5) *Where the Board determines, pursuant to paragraph (4)(c), that a collective agreement or arbitral award shall remain in force, either party to the collective agreement or arbitral award may, not later than sixty days after the date the Board makes its determination, apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.*

(6) *Where no application for an order is made pursuant to subsection (3) within the period specified in that subsection, the corporation or business, as employer of the employees, or any bargaining agent bound by a collective agreement or arbitral award that, by subsection (1), is continued in force, may, during the period*

commencing on the one hundred and fifty-first day and ending on the two hundred and tenth day after the date the portion of the public service of Canada is established as or becomes a part of the corporation or business, apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(7) Where the Board has made an order pursuant to paragraph (4)(c), this Part applies to the interpretation and application of any collective agreement or arbitral award affected thereby.

(8) An arbitral award that is continued in force by virtue of subsection (1) is deemed to be

(a) part of the collective agreement for the bargaining unit to which the award relates, or

(b) where there is no collective agreement for the bargaining unit, a collective agreement for the bargaining unit to which the award relates

for the purposes of section 49, and this Part, other than section 80, applies in the respect of the renewal or revision of the collective agreement for entering into a new collective agreement."

(relevant amendments underlined)

These amendments to section 47 of the Code by virtue of Bill C-31 (*Budget Implementation Act, 1996*) came into force on June 20, 1996, i.e. before the transfer Agreement was entered into between the City and Transport Canada.

Consequently, section 47 now applies where bargaining rights of a portion of the public service are transferred not only to corporations that are agents of the Crown but also to private federal businesses, as defined in sections 2 and 44 of the Code. Therefore, if the severed portion of the public service is set up as a private federal business - or becomes a part of such a business - section 47 of the Code will apply to the labour relationship emerging from that transfer. Applications must however be filed with the Board in compliance with the time limitations set forth in the various

subsections of section 47. In the present case, the certification application was filed within the time limits of section 47(2).

The intervenor IAFF argues that the "recipient" business must be a federally regulated business before the transfer for section 47 to apply. With due respect, we do not agree. As is the case with transfers of businesses regulated by section 44, the Code does not require that the buyer of a business (section 44) or a portion of the public service of Canada (section 47) be a federal undertaking prior to the transfer. What matters in those two circumstances is that the acquiring business be found to operate a federal activity as a consequence of the transfer; see for example Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRBR (2d) 218; and 87 CLLC 16,049 (CLRB no. 649), affirmed by the Federal Court of Appeal, judgment rendered from the bench, no. A-762-87, January 28, 1988; Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 77 di 85; 1 CLRBR (2d) 239; and 89 CLLC 16,019 (CLRB no. 737); Canada Post Corporation and Nieman's Pharmacy (1989), 77 di 181; and 4 CLRBR (2d) 161 (CLRB no. 742).

In the present case, it is of no consequence that the City was not a federally regulated business prior to the agreement. The City's newly created Airport Division began operating as a federal business when it agreed to provide ERS at the Airport. In our view, that is sufficient to conclude that section 47 is applicable.

VIII

APPROPRIATE UNIT

The City essentially takes the position that a bargaining unit consisting of ERS fire fighters is not appropriate because the City both provides provincially regulated structural fire fighting and because certain ERS fire fighters - who would be federally certified - perform structural fire fighting outside of the Airport Division. While that

may be the exceptional case, it is nevertheless clear that the normal and habitual activities of ERS fire fighters at the Airport is to provide emergency response services as required by the Regulations. The personnel requirements, training, qualifications and ERS response status are all determined by the said Regulations (see sections 303.13 - 303.18). In addition, the Service Contract with the federal Crown sets out these staffing requirements and the positions required to meet the City's obligations.

As a consequence, the individuals who fill these positions have a clear community of interest in terms of working conditions, training, scheduling and regulatory requirements. As well, the unit of ERS employees working at the Airport Division is readily distinguishable, divisible from the City's structural fire fighters and, in the circumstances, constitutes a unit appropriate for collective bargaining.

IX

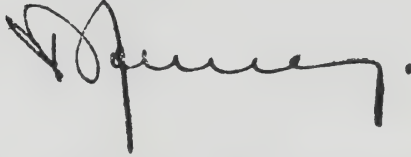
We therefore find that:

1. the Board has constitutional jurisdiction to entertain the application for certification filed by the PSAC to represent the fire fighters employed by the City who provide ERS at the Airport;
2. section 47 of the Code applies to the present case;

and hereby order that:

3. PSAC be certified as bargaining agent for a unit of employees consisting of:


"all fire fighters providing emergency response services at the J.G. Diefenbaker Airport, save and except the Fire Chief".



Richard I. Hornung, Q.C.
Vice-Chair



Roza Aronovitch
Member



David Gourdeau
Member

information

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Summary

Seafarers' International Union of Canada; Canadian Merchant Service Guild, *applicants*; Rederiet A.P. Moller A/S; Seabase Limited, *respondents*; Government of Newfoundland and Labrador, *interested party*.

Board Files: 18118 (555-4186)
18119 (555-4187)
18120 (555-4188)
18124 (555-4189)
18125 (555-4190)
18126 (555-4191)
18261 (555-4216)

CLRB/CCRT Decision no. 1218
January 27, 1998

These reasons deal with applications filed by the Seafarers' International Union of Canada (SIU) involving two potential employers, Rederiet A.P. Moller A/S ("Moller") and Seabase Limited ("Seabase"), to be certified as the bargaining agent for the unlicensed employees working on board three vessels operating out of St. John's, Newfoundland, in support of the Hibernia offshore oil production installation ("Hibernia").

Moller, the operator of the the three vessels, argued that the employer of the crew is Seabase, which is in the business of providing support services to the marine industry. In the instant case, Seabase recruits and supplies crews to Moller for the three vessels. The Board's constitutional jurisdiction is also challenged on the ground that the vessels are

Résumé

Syndicat international des marins canadiens; Guilde de la marine marchande du Canada; *requérants*, ainsi que Rederiet A.P. Moller A/S et Seabase Limited, *intimées*; Government of Newfoundland and Labrador, *partie intéressée*.

Dossiers du Conseil: 18118 (555-4186)
18119 (555-4187)
18120 (555-4188)
18124 (555-4189)
18125 (555-4190)
18126 (555-4191)
18261 (555-4216)

CLRB/CCRT Décision n° 1218
le 27 janvier 1998

Les présents motifs portent sur des demandes présentées par le Syndicat international des marins canadiens (SIMC) visant deux employeurs possibles, Rederiet A.P. Moller A/S («Moller») et Seabase Limited («Seabase»), en vue d'être accrédité à titre d'agent négociateur des employés non brevetés travaillant à bord de trois navires à partir de St. Jean (Terre-Neuve), au soutien de l'installation extracôtière de production de pétrole Hibernia («Hibernia»).

Moller, l'exploitant des trois navires, soutient que l'employeur de l'équipage est Seabase dont les activités consistent à fournir des services de soutien au secteur maritime. En l'espèce, Seabase recrute et fournit des équipages pour les trois navires de Moller. La compétence constitutionnelle du Conseil est également contestée au motif que les navires

governed for labour relations purposes by the Newfoundland Labour Relations Act, as the result of the Canada-Newfoundland Atlantic Accord and the Canada-Newfoundland Atlantic Accord Implementation Act.

The Board found that Seabase is essentially a crewing agent for Moller, which clearly controls the employees' work and working conditions. On the basis of the criteria described in Nationair (Nolisair International Inc.) (1987), 70 di 44 (CLRB no. 630), the Board was convinced that Moller maintains ultimate control over the employees and is the employer for labour relations purposes.

The Board found that jurisdiction over the labour relations between the crews working on the three vessels and their employer, Moller, fell within the federal jurisdiction and that Parliament's intention, pursuant to the Atlantic Accord, section 152 of the Canada-Newfoundland Atlantic Accord Implementation Act and the applicable federal and provincial regulations, was to maintain such federal jurisdiction over labour relations with respect to these vessels operated by Moller.

The application with respect to Moller is therefore granted.

sont assujettis, en matière de relations de travail, à la Newfoundland Labour Relations Act, aux termes de l'Accord atlantique Canada-Terre-Neuve et de la Loi de mise en oeuvre de l'Accord atlantique Canada-Terre-Neuve.

Le Conseil conclut que Seabase est essentiellement un agent de recrutement pour Moller dont relèvent clairement le travail et les conditions de travail des employés. Suivant les critères énoncés dans Nationair (Nolisair International Inc.) (1987), 70 di 44 (CCRT n° 630), le Conseil est convaincu que Moller exerce le contrôle ultime sur les employés et est l'employeur en matière de relations de travail.

Le Conseil conclut que les relations de travail entre les équipages travaillant à bord des trois navires et leur employeur, Moller, relèvent de la compétence fédérale et que l'intention du Parlement, aux termes de l'Accord atlantique, de l'article 152 de la Loi de mise en oeuvre de l'Accord atlantique et des règlements fédéraux et provinciaux pertinents, était de maintenir cette compétence fédérale sur les relations de travail relativement aux navires exploités par Moller.

La demande est donc accueillie relativement à Moller.

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Conseil
Canadien des
Relations du
Travail

Reasons for decision

Seafarers' International Union of Canada,

applicant,

and

Rederiet A.P. Moller A/S;
Seabase Limited;
The Maersk Company of Canada Ltd.,

respondents.

and

Government of Newfoundland and Labrador,

interested party.

Board Files: 18118 (555-4186)
18119 (555-4187)
18120 (555-4188)

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Board Files: 18124 (555-4189)
18125 (555-4190)
18126 (555-4191)

and

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Canadian Merchant Service Guild,

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and

Rederiet A.P. Moller A/S, and
Seabase Limited,

respondents.

Board File: 18261 (555-4216)

CLRB/CCRT Decision no. 1218
January 27, 1998

The Board was composed of Mr. Richard I. Hornung, Q.C, Vice-Chair, and Mr. Michael Eayrs and Ms. Véronique L. Marleau, Members.

Appearances:

Mr. Dale Lenehan and Mr. Mark Murray, for the unions;
Mr. Doug McMillan, for the Seafarers' International Union of Canada;
Mr. Bruce Carter, for the Canadian Merchant Service Guild;
Mr. Augustus Lilly, for the employers;
Mr. Knud Levring, for Rederiet A.P. Moller A/S;
Mr. Paul Locke, for Seabase Limited; and
Ms. Mary Mandville, for the Government of Newfoundland and Labrador.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

These reasons deal with applications by the Seafarers' International Union of Canada ("SIU") for certification as bargaining agent for the unlicensed employees working on board three vessels operating out of St. John's, Newfoundland in support of the

Hibernia offshore oil production installation (hereafter "Hibernia"). The vessels, owned by The Maersk Company Canada Ltd. (hereafter "Maersk"), are the Norseman, the Nascopie and the Placentia. Maersk Canada is a subsidiary of Rederiet A.P. Moller A/S (hereafter "Moller"), an international shipping conglomerate, based in Copenhagen, Denmark. Seabase Limited (hereafter "Seabase") a Canadian company operating out of St. John's, contracted - pursuant to a crewing contract with Maersk (Exhibit 4.1) - to provide crews on the three vessels. Because of a dispute between the parties as to the appropriate employer, applications were brought with respect to Moller, Maersk and Seabase. All three respondent companies were represented by single Counsel and, at the hearing, the applications with regard to Maersk (Board file nos. 18120 (555-4188) and 18126 (555-4191)) were withdrawn.

On October 31, 1997 the Board advised the parties by letter: (1) that it had determined that jurisdiction over labour relations in this case fell within the Canada Labour Code; (2) that Moller was the employer for labour relations purposes; and, (3) ordered the Union to be certified as the bargaining agent for a unit appropriate. At that time the Board indicated that reasons for its decision would follow; these are the reasons.

II

The general nature of each company's operation is described in the investigating officer's report as follows:

"Maersk Canada and A.P. Moller are member companies of the A.P. Moller Group of Companies headquartered in Copenhagen, Denmark...the general nature of the business of the A.P. Moller Group of Companies includes '...the ownership, management, and operation of safety standby vessels, multi-purpose supply vessels, container vessels, tankers, gas carriers, bulk and special vessels and drilling rigs, along with exploration and production of oil and gas, ship building, aviation, industrial production and retailing operations'. Worldwide, the A.P. Moller Group of Companies

operate approximately three hundred fifty (350) vessels of which approximately forty-five (45) are support/supply vessels.

Six (6) of the support/supply vessels are owned by Maersk Canada. Five (5) are Canadian flag vessels registered in St. John's and the sixth vessel, the Maersk Bonavista, is registered in the Bahama's. Three (3) of the six (6) vessels work in the North Sea - the Maersk Bonavista, Maersk Chignecto, and Maersk Gabarus - and are bareboat chartered to A.P.Moller. The other three (3) vessels - the Maersk Norseman, Maersk Placentia and Maersk Nascopie - are under charter from Maersk Canada to the Hibernia Management and Development Company, Ltd. ('Hibernia') and work in support of the Hibernia offshore oil production installation ('Hibernia Installation').

Seabase is in the business of providing support services to the marine industry. At present, its only clients are companies in the A.P. Moller Group of Companies. It recruits and supplies crews to A.P. Moller for the two (2) Canadian flag vessels working in the North Sea and to Maersk Canada for the three (3) vessels working in support of the Hibernia Installation. It also provides five (5) employees to another company in the A.P. Moller Group of Companies who work at a gas production facility located off the west coast of Africa. At one point, it also provided licensed personnel for the Maersk Bonavista but this arrangement is no longer in place.

Seabase acts as marketing agent for A.P. Moller/Maersk Canada vessels in Canada but, at present, the only vessels working in Canada are the three (3) vessels involved in the Hibernia project. It also provides ship agency functions to the Hibernia vessels. These include such things as delivering spare parts to the vessels, handling mail, and providing cash advances to the vessel for operational purposes."

The three vessels in question here are all exclusively chartered, as support/supply vessels, to the Hibernia Management and Development Company ("HMDC") which, on behalf of a number of owners, operates the Hibernia platform located on the Canadian continental shelf in the Atlantic Ocean some 315 kilometers east of St. John's, Newfoundland. In operating the platform, HMDC is carefully regulated by the Canada Newfoundland Offshore Petroleum Board (CNOPB).

Support/supply vessels have three main functions in assisting the Hibernia operation: standby, resupply, and ice patrol. Two of the vessels, the Nascopie and Norseman, were purpose built specifically for the Hibernia project. The third, the Placentia, although not purpose built, is fitted with a water cannon to combat icebergs, which is why it was chosen for charter to HMDC. The Nascopie and Norseman are specifically outfitted as "standby" vessels. As such they are "audited" by, and must comply with, the requirements of the CNOPB as well as applicable Canadian Coast Guard standards. One of these standby vessels must be on duty at all times and is required by regulation to remain within 20 minutes of the Hibernia platform in order to respond in an emergency. Their main purpose is to assist in the evacuation and rescue of personnel should it be required.

In addition to their standby functions the vessels serve as multi-purpose supply vessels. In that capacity, they transport 95% of the supplies necessary to keep the platform operational. They also provide offshore loading and tanker support, oil recovery, diving support and ice management. The Placentia spends 70% of its time on ice management and the balance on resupply duties. The Norseman and Nascopie spend 50% of their time in standby mode with the balance in ice management or supply functions. Although the vessels perform these additional functions, their primary obligation is standby; without specific clearances they cannot do anything that might compromise their standby mode.

III

The present certification applications are not the first involving these parties. In November 1995, the SIU filed two applications - along with a third in January 1996 - to be certified as the bargaining agent for all unlicensed employees working on board the Maersk Gabarus and Maersk Chignecto. These vessels were owned by Maersk but crewed by Seabase. In that case, Seabase argued that A.P. Moller was the real employer in that it was responsible for employer-employee relations. The Board's jurisdiction was also challenged. The Board determined that it had jurisdiction over

the parties and that the true employer was Moller and not Seabase. Consequently, the Board issued a certification order naming A.P. Moller as the employer for a unit composed of all unlicensed employees working on board the "Maersk Chignecto" and "Maersk Gabarus" (see Rederiet A.P. Moller A/S (1996), 102 di 31; and 32 CLRBR (2d) 136 (CLRB no. 1174)); affirmed by the Federal Court of Appeal, Rederiet A.P. Moller A/S v. Seafarers' International Union of Canada, judgement rendered from the bench (file No. A-616-96, January 30, 1997).

Although the companies agree that the present case raises similar issues, they contend that it nevertheless provides factual and legal distinctions that set it apart from the Board's earlier decision in two respects:

1. on the actual employer aspect, they argue that the facts, with respect to Seabase's duties and functions, differ in significant respects from those in Board decision no.1174, such that we should conclude that Seabase and not Moller is the employer for labour relations purposes;
2. on the constitutional jurisdiction issue, they argue - as set out in their notice filed pursuant to section 57(1) of the Federal Court Act - that:

- "1. The vessels as operated are, for labour relations purposes, an integral part of the Hibernia Installation, which is governed by provincial labour relations law;*
- 2. A vessel servicing a provincially regulated site in the Exclusive Economic Zone from the same province is engaged in an equivalent to intra-provincial marine operation for labour relations purposes.*
- 3. The Canada Labour Relations Board cannot have constitutional jurisdiction to adjudicate labour relations matters arising under mirror federal and provincial legislation, which is by its terms paramount over other federal or provincial legislation."*

IV

ACTUAL EMPLOYER

The determination of the actual employer is a question of fact which turns on the notion of ultimate control and fundamental authority over the licensed and unlicensed employees working on the vessels.

As indicated, Seabase is in the business of supplying crews, support services and agency marketing to the marine industry. At present its only clients are companies in the Rederiet A.P. Moller Group. It recruits and supplies crews for the two Canadian flag vessels working in the North Sea as well as the three vessels that are at issue here. It also supplies employees to another Moller company operating a gas production facility off the African coast.

Mr. Paul Locke, the President of Seabase, testified that in the earlier case of the Chignecto and Gabarus (Board decision no.1174), Seabase simply sent a list of employees to Moller and Moller selected the crew it wished. According to Locke, in the present case, Seabase prepared the list of its direct hires for the three vessels and sent it to Moller. Although in the case of masters and chief engineers Moller's approval was necessary prior to their being hired, that was not the case with regard to the remaining employees.

Locke testified that, here, Seabase alone was responsible for determining which probationary employees remained as crew.

Although no direct examples were available, Locke advised that in disciplinary matters, although the officers follow an instruction manual prepared by Moller, Seabase would impose the discipline based on reports filed by the master.

Although at the time of the hearing the unlicensed employees on all three vessels operated under the terms of the same "North Sea" agreement which applied to the Chignecto and Gabarus employees.

According to Locke, Seabase has assumed all the responsibilities that Moller would normally be required to provide under the Technical Management Agreement (Exhibit 4.1). He indicated that although Seabase and Moller intended to change the agreement - to substitute Seabase for Moller - they "didn't get around to it right away", or in any event prior to the present applications.

Locke conceded in cross-examination that when the crews on the Nascopie and Norseman were originally put in place following their mobilization to the North Sea - while awaiting the commencement of the Hibernia charter - they were hired on the same basis that prevailed for the Chignecto and Gabarus, i.e., Moller had to approve all of the seaman before they were hired and Seabase was not doing the full crew management. Locke further conceded that the subsequently realized expectation was that the crew so hired would be the same crew when the ship returned for the HMDC charter.

Although Seabase views its position as fulfilling "full" crewing responsibilities, the following facts do not reflect that conclusion:

- Although Seabase takes the position that the list of "hired" licensed and unlicensed employees it sends to Moller constitutes a *fait accompli* list, it is nevertheless clear that Moller retains the right to reverse Seabase's decision with respect to any employee whose name was submitted by Seabase and therefore ultimately controls access to employment.
- Masters operate the ships according to the instructions received from Moller.

- The crews of the Nascopie and the Norseman were, as described above, effectively "hired" by Moller.
- Both the masters and chief engineers must be approved by Moller and HMDC prior to being hired.
- Employee assessment forms and evaluation lists for probationary employees are Moller's forms and are submitted by the master to both Seabase and Moller.
- Masters operate the ships according to instructions received from Moller. These instructions include a manual in which Moller instructs officers on how to handle discipline matters on board the ships.
- Personnel are currently paid according to the wage scale established by Moller pursuant to the North Sea agreement. Seabase is now working on a new wage scale, which Moller must ultimately approve.
- Moller directs, pays and is responsible for the initial training of new crew on the Norseman and Placentia.
- Advanced training is also paid for and directed by Moller.
- The master must give daily situation reports to Moller, which reports are copied to Seabase.

We are of the view that Seabase is essentially only a crewing agent for Moller with respect to the three vessels in question. The operation of each vessel is such that Moller clearly controls the employees' work and working conditions. Because its approval is required before any change in wage rates is agreed upon by Seabase, Moller effectively establishes wage scales and controls salary negotiations. On the

basis of the criteria discussed in Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630), we are satisfied that Moller maintains ultimate authority in a number of critical areas - including, inter alia, those set out above - which demonstrate that it retains decisive control over the employees in question and, as such, it is Moller and not Seabase that is the employer for labour relations purposes.

V

CONSTITUTIONAL JURISDICTION

Section 4 of the Code provides as follows:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Based on sections 91 and 92 of the Constitution Act, 1867, section 2 of the Code defines "federal work, undertaking or business" as follows:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

...

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

...

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act;..."

In addition, the Parliament of Canada has residual jurisdiction over the right to explore and exploit the continental shelf off Newfoundland pursuant to the peace, order and good government power granted under the Constitution Act; see Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (1984), 5 D.L.R. (4th) 385.

Normally therefore, jurisdiction over the vessels in question here would accordingly fall within the federal domain by virtue of the above.

In The Atlantic Accord, signed on February 11, 1985, the Governments of Canada and Newfoundland concluded a memorandum of agreement to establish a joint federal-provincial scheme for the management of the offshore oil and gas resources off Newfoundland and Labrador and the sharing of revenues from the exploitation of those resources.

Article 61 of the Atlantic Accord provides that:

"The Government of Canada will introduce in Parliament legislation to extend federal laws to apply to activities in the offshore, and apply appropriate provincial laws, including social legislation such as occupational health and safety legislation and other legislation designed to protect workers."

With respect to those provincial laws that would be made applicable by Parliament, Article 62 provides:

"Federal Courts shall be invested with jurisdiction in the offshore area in respect of any matter to the same extent as if the matter had arisen within their ordinary jurisdiction. Provincial courts shall be invested with jurisdiction in the offshore region in respect of any matter arising under the laws made applicable by Parliament to the offshore region to the same extent as if the matter had arisen within their ordinary territorial jurisdiction. For the purpose of this paragraph, the offshore region shall be deemed to be within territorial limits of the judicial centre of St-John's as defined in the District Court Act, 1977."

(emphasis added)

Under the provisions of the Canada-Newfoundland Atlantic Accord Implementation Act; S.C. 1987, c.3, as amended (hereafter the "Federal Implementation Act") Parliament enacted legislation designed to implement the terms of the Federal Government's agreement contained in the Atlantic Accord. The Federal Implementation Act, in specific circumstances, suspends and/or limits the application of the Canada Labour Code in an area otherwise under the exclusive legislative jurisdiction of Parliament and, by reference, incorporates the labour relations regime found in the Newfoundland Labour relations Act, 1977, S.N. 1978, c.23.

Section 152 of the Federal Implementation Act provides as follows:

"152(1) In this section,

'marine installation or structure' includes

(a) any ship, offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, and

(b) any other work or work within a class of works prescribed pursuant to paragraph (5)(a);

but does not include any vessel that provides any supply or support services to a ship, installation, structure or work described in paragraph (a) or (b);

'Newfoundland social legislation' means The Boiler, Pressure Vessel and Compressed Gas Act, Chapter 12 of the Statutes of Newfoundland, 1981, as amended from time to time, The Elevators Act, Chapter 107 of the Revised Statutes of Newfoundland, 1970, as amended from time to time, The Labour Standards Act, Chapter 52 of the Statutes of Newfoundland, 1977, as amended from time to time, The Occupational Health and Safety Act, Chapter 23 of the Statutes of Newfoundland, 1978, as amended from time to time, The Radiation Health and Safety Act, Chapter 90 of the Statutes of Newfoundland, 1977, as amended from time to time, The Workers' Compensation Act, 1983, Chapter 48 of the Statutes of Newfoundland, 1983, as amended from time to time and any other Act of the Legislature of the Province, as amended from time to time, as may be prescribed.

(2) The Newfoundland social legislation and any regulations made thereunder apply on any marine installation or structure that is within the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum within the offshore area.

(3) Notwithstanding subsection (2), any provision of any Act or regulation referred to in that subsection made in relation to a matter respecting which a regulation under paragraph 149(1)(d), (m), (o) or (p) or any other provision of this Act respecting occupational health or safety may be made does not apply on marine installations or structures referred to in subsection (2) during such time as those installations or structures are within the offshore area in connection with a purpose referred to in that subsection.

(4) Notwithstanding subsection 80(1) of the Canada Labour Code or any other Act of Parliament,

(a) Parts III and IV of the Canada Labour Code do not apply on any marine installation or structure referred to in subsection (2), and

(b) in respect of any marine installation or structure referred to in subsection (2) that is within the offshore area for the purpose of becoming, or that is, permanently attached to, permanently

anchored to or permanently resting on the seabed or subsoil of the submarine areas of the offshore area,

(i) Part V of the Canada Labour Code does not apply, and

(ii) The Labour Relations Act, 1977 Chapter 64 of the Statutes of Newfoundland, 1977, as amended from time to time applies during such time, as the marine installation or structure is within the offshore area in connection with a purpose referred to in that subsection.

(5) Subject to section 7, the Governor in Council may make regulations

(a) prescribing a work or a class or works for the purpose of the definition 'marine installation or structure' in subsection (1); and

(b) prescribing, for the purpose of subsection (2), any Act of the legislature of the Province or excluding any such Act from the application of that subsection."

(emphasis added)

The original definition of "marine installation" was amended, as highlighted above, in 1988 when Parliament passed the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, 1988 S.C. c.28.

The Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act, R.S.N. 1990, c. C-2, (hereafter the "Newfoundland Implementation Act") represents the "mirror" legislation enacted by the province to implement the Atlantic Accord. However, the Newfoundland Implementation Act does not contain a provision that reflects section 152 of the Federal Implementation Act; rather, it recognizes that Parliament has exclusive jurisdiction over the offshore area and, as such, only it can legislate that Newfoundland's Labour Relations Act could apply in lieu of the Code.

VI

Part of the companies' argument that the vessels are subject to provincial jurisdiction centers on the fact that the Nascopie and Norseman, being purpose built, are designed to operate the Gemevac evacuation system installed at the Hibernia platform. This system, not in use anywhere else in the world, can only operate with specially designed vessels. As well, HMDC owns the evacuation equipment on both vessels and maintains responsibility for training personnel, both on the platform and the vessels themselves, in the operation of the Gemevac system. As such, the companies argue, the vessels are inextricably linked to the platform itself.

In essence, the companies argue that the factual circumstances surrounding the construction, deployment, operation and functions of the three vessels are such that they are vital, essential and integral to, and so functionally integrated with, the operation of the Hibernia site and that for labour relations purposes they should be regarded as a single entity - part of the "marine installation" which Hibernia represents - and therefore subject to Newfoundland jurisdiction pursuant to the provisions of the Federal Implementation Act.

With respect, we do not agree. The companies' argument essentially attempts to reverse the integral and essential test which is commonly used to trigger the jurisdictional application of Part I of the Canada Labour Code over the activities of a provincial subsidiary operations (Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; and United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112). This test simply has no application to assert provincial jurisdiction on an undertaking over which Parliament has primary legislative authority.

Although the main purpose of two vessels is to assist in the rescue of personnel from the Hibernia platform, the overall activities of the three vessels can only be characterized as shipping activities carried out principally in international waters and

over which Parliament has primary authority pursuant to section 91(10) of the Constitution Act, 1987. Given Parliament's primary legislative authority over navigation and shipping, if jurisdiction over labour relations on the vessels is to fall under the authority of the province of Newfoundland, that jurisdiction must be found in explicit federal legislation, which incorporates by reference the provincial labour relations regime; (Peter W. Hogg, Constitutional Law of Canada, 3rd ed. Scarborough, Ont.: Carswell, 1992, pages 14-20).

VII

The companies argue that such legislation is to be found within a combination of the provisions of the Atlantic Accord - specifically section 61 - and section 152 of the Federal Implementation Act.

According to the companies, by virtue of the "deeming" provisions contained in the Atlantic Accord (since they are operating in the offshore region), coupled with the fact that the Hibernia platform constitutes a "marine installation" (subject to provincial jurisdiction under the Federal Implementation Act), the vessels in question are essentially travelling from one part of the province to another part of the province, and therefore within the jurisdiction of Newfoundland.

In our view, the deeming provision has a limited application and cannot support the broad premise of the companies' argument. The terms of Article 62 of the Atlantic Accord cannot serve to transform the shipping operation into an inland water transportation system in order to establish provincial jurisdiction over labour relations on the vessels in question. The purpose of the provision, which deems the offshore area to be within Newfoundland territory, is simply to extend the ordinary territorial jurisdiction of provincial courts to matters arising from such provincial laws - or social legislation - that will be made specifically applicable to offshore marine installations through the application of section 152 of the Federal Implementation Act.

Although the Federal Implementation Act provides for the application of specific Newfoundland legislation to certain marine installations or structures, it does not state that the marine installation becomes part, or an extension, of the province of Newfoundland. The language of section 152 cannot, in our view, be interpreted in a manner such that would have Parliament surrender its jurisdiction in the offshore area in such a broad fashion. Nor can it be deemed to expand the territorial jurisdiction of the province by, in effect, turning a marine installation into a "port" of Newfoundland so as to transform travel from the mainland to the marine installation into intra provincial travel from one Newfoundland port to another.

Furthermore, the general provisions of section 61 of the Atlantic Accord - and the reference to the application of "social legislation" contained therein - cannot, in light of the specific provisions of the Federal Implementation Act, be deemed to include the application of Newfoundland's labour relations regime on the vessels in question.

Pursuant to sections 152(2) and (4), Parliament has made certain Newfoundland social legislation specifically applicable to a "marine installation or structure" as defined in subsection 152(1). In order for the provisions of Newfoundland's "social legislation" - and, by extension, the Labour Relations Act - to apply to the vessels in question they must, in any event, fall within the definition of "marine structure or installation".

Pursuant to section 152(1) of the Federal Implementation Act, supply and support vessels have been excluded from the definition of "marine installation or structure". In fact, as set out earlier, Parliament specifically amended the original definition of "marine installation" contained in that section, in order to clarify that "*marine installation or structure...does not include any vessel that provides any supply or support services to a ship, installation, structure or work described in paragraph (a) or (b);*". In addition, reference to the definition of "support craft" in the Newfoundland Offshore Area Petroleum Production and Conservation Regulations,

SOR/95-103¹, as well as the Newfoundland Offshore Petroleum Drilling Regulations, SOR/93-23², makes it apparent that the kind of support services provided by the Placentia, Norseman and Nascope to the Hibernia platform were intended by Parliament to be captured by the 1988 amendment excluding support vessels from the definition of "marine installation or structure".

We conclude, therefore, that Parliament cannot be deemed, by virtue of the general provisions of the Atlantic Accord, to have relinquished its jurisdiction over labour relations on the vessels in question.

VIII

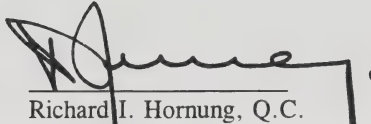
Notwithstanding the able and ingenious argument of counsel for the companies, we find that Parliament's intention - in light of the explicit language of the Atlantic Accord, section 152 of the Federal Implementation Act and the applicable federal and provincial regulations - was to maintain federal jurisdiction over labour relations with respect to many offshore activities, including those on the vessels as they are operated in the present case.

Accordingly, we find that jurisdiction over the labour relations between the crews working on the Nascope, the Norsemen and the Placentia and their employer fall within the purview of the Parliament of Canada and are governed by the provisions of the Canada Labour Code. And, we direct that Moller is the employer for labour relations purposes.

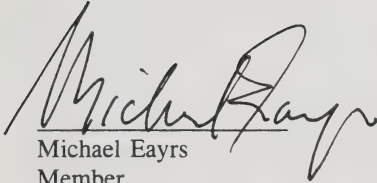
¹"'support craft' means a vessel, vehicle, tug, ship, aircraft, air-cushion vehicle, standby vessel or other craft used to provide transportation for or assistance to persons on the site of a production operation or production project."

²"'support craft' means any vessel, tug, ship, aircraft, air-cushion vehicle or other craft used to provide transport for or assistance to a drilling program and includes a standby vessel but does not include a drilling installation."


As indicated, formal orders have already been issued certifying the union as the bargaining agent of the employees sought.



Richard I. Hornung, Q.C.
Vice-Chair



Michael Eayrs
Member



Véronique L. Marleau
Member

information

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Summary

International Brotherhood of Electrical Workers, Local Union 1574, *complainant*, and Data-Tel Cabling Systems (North American) Corp., *respondent*.

Board File: 17661 (745-5491)
CLRB/CCRT Decision no. 1219
February 3, 1998

This is a complaint by the International Brotherhood of Electrical Workers, Local Union 1574, alleging that the respondent employer, Data-Tel Cabling Systems (North American) Corp., violated section 94(3)(a)(i) of the Canada Labour Code by terminating the employment of Chris Mann.

The parties were advised that the Board had scheduled the matter for hearing. On the hearing date, no one from the respondent employer appeared. Following the commencement of the hearing, the Board proposed a delay of one day to accommodate the employer. Notwithstanding the attempts of the union and Board to accommodate the employer, the Board was advised that no one would attend to represent the employer. Accordingly, the Board proceeded in the employer's absence.

The Board found that the respondent employer was in breach of section 94 of the Code by terminating Mr. Mann's employment because of his union activities.

The Board accordingly ordered the appropriate compensation be paid by the respondent employer.

Résumé

Fraternité internationale des ouvriers en électricité, section locale 1574, *plaignante*, et Data-Tel Cabling Systems (North American) Corp., *intimée*.

Dossier du Conseil: 17661 (745-5491)
CLRB/CCRT Décision n° 1219
le 3 février 1998

La Fraternité internationale des ouvriers en électricité, section locale 1574, a déposé une plainte alléguant que l'employeur intimé, Data-Tel Cabling Systems (North American) Corp., avait violé le sous-alinéa 94(3)a(i) du Code canadien du travail en mettant fin à l'emploi de Chris Mann.

Les parties ont été informées que le Conseil avait mis l'affaire au rôle. À la date fixée, aucun représentant de l'employeur intimé ne s'est présenté à l'audience. Après l'ouverture de l'audience, le Conseil a proposé un délai d'une journée pour faciliter les choses à l'employeur. Malgré les efforts du syndicat et du Conseil, l'employeur a fait savoir au Conseil que personne ne le représenterait. Le Conseil a donc poursuivi l'audience en l'absence de l'employeur.

Le Conseil a conclu que l'employeur intimé avait violé l'article 94 du Code en mettant fin à l'emploi de M. Mann en raison de ses activités syndicales.

Le Conseil a donc ordonné à l'employeur intimé de verser l'indemnité qui s'imposait.



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LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

International Brotherhood of Electrical
Workers,
Local Union 1574,

complainant,

and

Data-Tel Cabling Systems (North American)-
Corp.,

respondent.

Board File: 17661 (745-5491)
CLRB/CCRT Decision no. 1219
February 3, 1998

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members.

Appearances:

Mr. Larry Schell, for the International Brotherhood of Electrical Workers, Local Union 1574.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The International Brotherhood of Electrical Workers, Local Union 1574 (IBEW), filed a complaint on behalf of Mr. Chris Mann, the complainant, alleging that the respondent employer violated section 94(3)(a)(i) of the Canada Labour Code by terminating the employment of Chris Mann.

This matter was scheduled for hearing in Edmonton on January 6, 1998, at 10:00 a.m. Data-Tel was provided with notification of the hearing date in a letter from the Board dated November 28, 1997. Notwithstanding the fact that it was notified, Data-Tel did not send a representative to the hearing, nor did it inform the Board that it could not attend.

Prior to the commencement of the hearing, the Board's Clerk spoke with a representative of Data-Tel who informed him that Mr. Connors, the President of Data-Tel, was in a meeting in Ontario and had no plans to attend the hearing. Further, he was advised that if no one was currently present, no one would attend. At the commencement of the hearing, and prior to proceeding, the Board, with the agreement of the Union, instructed its clerk to contact representatives of Data-Tel, advise them that the Board was prepared to adjourn to the following day to accommodate them, and determine whether or not they intended to attend at the hearing or otherwise send a representative. The Board adjourned for a period of approximately an hour and a half to facilitate that process.

We were advised by the Clerk that he accordingly spoke with the representatives of Data-Tel on two further occasions. On the first of those, the clerk was informed by Mr. Connors' secretary that she could not commit Mr. Connors either way and would call him back. On the second occasion he was now told that Mr. Connors was ill and that no one from Data-Tel would attend at the Board hearing. He was told as well that a letter to that effect would be sent to the Board's offices in Ottawa.

Having regard to the above and the employer's refusal to attend the hearing notwithstanding acknowledged notice of the same and the Board's offer to accommodate it, the Board proceeded in the employer's absence.

II

Mr. Chris Mann began work with Data-Tel on August 7, 1996. He was hired as a lineman/installer to install and replace TV cable at Inuvik, in the Northwest Territories. His initial rate of pay was \$13 per hour and was subsequently raised to \$14 per hour. He was employed as a foreman and in that capacity relayed instructions received from Data-Tel to employees that he worked with both in Inuvik and subsequently in Tuktoyaktuk. While he was in Tuktoyaktuk in September 1996, considerable unrest arose with the employees over the fact that their paycheques were not received, nor were payments for food and expenses made by Data-Tel in a timely fashion.

As a result, discussions evolved regarding the formation of a union to represent the employees. Mann became actively involved in recruiting employees to join the IBEW and to sign petitions for the certification of Data-Tel.

On September 25, 1996, he received a call from the union representative advising him that an application had been filed with the CLRB on behalf of IBEW seeking certification as the bargaining agent for the employees of Data-Tel.

On September 26, 1996, Mann received a letter by fax (Exhibit 7) from Data-Tel which advised as follows:

"We do not understand your action and why nothing has been done with the audit. We were faxed this morning this paper with your name and address, having applied for union membership, by Local 1574 of the interchanged Br. of I.B.E.W.

We always understood that you are a part of our management team by the way, why are you going to the union and becoming a union member? Can you explain. Thanks."

The letter was signed by Mike Novakov. Mann did not respond to the letter. On the following day, September 27, 1996, he was requested to meet with Alex Smith, another management representative of Data-Tel at the airport in Inuvik. Smith's ostensible purpose in travelling to Inuvik was to bring paycheques to the various employees who, at this juncture, were apparently a month behind in receiving their pay. Smith met individually with each employee who attended at the airport and, prior to providing them with their paycheques, requested each of them to sign a release confirming payment in full of wages owing. At one juncture, Mann intervened and indicated that this was improper insofar as the employees had not been paid for various overtime and statutory holidays. Nevertheless, Smith continued to meet with employees individually dispensing the various cheques in return for the signed releases.

When it was Mann's turn to receive his cheque, Smith advised him that he, Mann, was to get his cheque from the Head Office. At this juncture, Mann went "across the street" to Data-Tel's office where Novakov met him, handed him his paycheque and said: "you are no longer employed by Data-Tel - you're fired". There was no further discussion between the two. Mann then returned to see Smith and told him that if he was fired he required his airline ticket to return home whereupon Smith reached into his pocket and handed Mann the ticket which he, Smith, had purchased earlier in the morning while Mann remained waiting for Smith's luggage following his arrival at the airport in Inuvik.

III

Notwithstanding the Employer's view, as expressed in its letter above, that Mann was "...part of the management team..." we are satisfied on the evidence that his role was that of a foreman at best. None of the job duties or functions which he fulfilled were of such nature as to remove him from the definition of "employee" under the Code.

IV

In D.H.L. International Express Ltd. (1995), 99 di 126 (CLRB no. 1147), the Board stated:

"As a legion of cases illustrate, the Board is extremely vigilant to protect the jobs and rights of employees who become involved in the organization of a trade union at the workplace.

At the risk of over-simplification, the Board's purpose, where a complaint pursuant to section 94(3) is filed, is to ensure that anti-union animus was not the reason for, or a consideration in, the employer's dismissal of an employee. The applicable test is described extensively in National Pagette (1991), 85 di 1 (CLRB no. 862), at pages 9-10:

'When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)'

(pages 34-35; and 14,007; emphasis added)'"

The Board is careful to ensure that the employer does not use outwardly legitimate reasons as a pretext to dismiss an employee for the underlying reasons of trade union activity.

...

The Board has consistently taken the approach that anti-union animus need only be a proximate cause for the impugned employer in order for it to be found in violation of section 94(3)(a)(i) of the Code. In order to safeguard the interests of employees in circumstances, such as the present case presents, the Code, in section 98(4), imposes a rebuttable presumption on the employer to show that the action taken by it was not motivated in any manner by anti-union animus.

'The Board does not act as an adjudicator to decide whether the employer had just cause to dismiss an

employee. Foremost, the employer must establish that, whether or not there was just cause, its action was not tainted by anti-union animus. The union must establish that there was anti-union animus, again whether or not there was just cause.'

(Pierre Fiset (1985), 55 di 233 (CLRB no. 473), page 242; and 85 CLLC 16,041)

In the words of the Board in Provincial Bank of Canada, Jonquière (1979), 36 di 58 at pages 61-62, (CLRB no. 216): '... we must ask ourselves whether there is a cause-effect relationship between (Mr. Sandhu's) union activities and (his) dismissal.'"

(pages 129-131)

Even leaving aside the failure of the employer to meet the required reverse onus pursuant to section 98(4) of the Code, we have no hesitation in concluding, on the basis of the contents of Exhibit 7, the conduct of the Employer and the timing of Mann's firing, that there existed a clear cause-effect relationship between Mann's firing and his union activity.

V

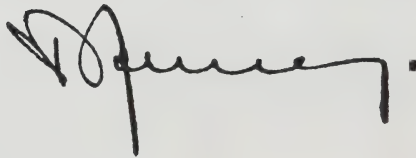
Having concluded that the employer was in breach of section 94, the only issue that remained for the Board to determine was the quantification of damages necessary to reasonably compensate Mann. The Board heard evidence from Mann which established that he would, but for his termination by the employer, have remained employed with Data-Tel from October 13 to December 23, 1996. He testified that his damages, as delineated in Exhibit No. 9, would have totaled \$12,740. This amount, based on the average hours worked during the completed portion of his employment contract, includes regular weekly hours calculated at \$14 per hour plus regular overtime, statutory holidays and vacation pay. It also takes into consideration

the time spent in travel. From the amount of \$12,740 must be deducted the amount that he earned during the period of October 13 to December 23, which we determined to be \$1,600. This leaves a total of \$11,140.00.

VI

We therefore find that Data-Tel breached sections 94(3)(a)(v) of the Code and hereby order that compensation, in the amount of \$11,140 be forthwith paid by Data-Tel, on behalf of Chris Mann, to:

International Brotherhood of Electrical Workers,
Local 1574,
c/o Larry Schell,
2 Haythorne Crescent,
Sherwood Park, Alberta,
T8A 3Z8.



Richard I. Hornung, Q.C.
Vice-Chair



Véronique L. Marleau
Member



Roza Aronovitch
Member

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Summary

Communications, Energy and Paperworkers Union of Canada, *applicant*, and Arnone Transport Limited, *employer*.

Board File: 18341 (555-4231)
CLRB/CCRT Decision no. 1220
February 12, 1998

The Communications, Energy and Paperworkers Union of Canada is seeking bargaining agent status to represent employees of Arnone Transport Limited who work in Arnone's terminal division. The employer submits that these employees should be represented by the Teamsters, Local 939, which Arnone has voluntarily recognized to represent employees working in its transport and garage division, and come under the terms of their collective agreement. Alternatively, the employer seeks one certified bargaining unit for all its employees.

The Board can only modify a voluntarily recognized bargaining unit and include employees in such a collective bargaining relationship in the context of a section 18 application seeking a review of the bargaining unit structure, which includes at least one certified unit. The Board - not having certified the Teamsters for its bargaining unit and in the absence of a certification application from that union - cannot determine that the employees of the terminal division are to be included in the bargaining relationship existing between Arnone and the Teamsters and covered by their collective agreement.

Résumé

Syndicat canadien des communications, de l'énergie et du papier, *requérant*, et Arnone Transport Limited, *employeur*.

Dossier du Conseil: 18341 (555-4231)
CLRB/CCRT Décision n° 1220
le 12 février 1998

Le Syndicat canadien des communications, de l'énergie et du papier veut devenir l'agent négociateur des employés de Arnone Transport Limited qui travaillent à la division du terminal de cette entreprise. L'employeur soutient que ces employés devraient être représentés par la section locale 939 des Teamsters, que Arnone a volontairement reconnue pour représenter les employés travaillant à sa division du transport et du garage, et qu'ils devraient être assujettis aux dispositions de la convention collective conclue avec ce syndicat. Subsidairement, l'employeur veut une unité de négociation accréditée regroupant tous ses employés.

Le Conseil peut modifier une unité de négociation reconnue volontairement et intégrer des employés dans ce genre de relation de négociation collective seulement dans le cadre d'une demande présentée en vertu de l'article 18 en vue de faire réviser la structure de l'unité de négociation, qui comprend au moins une unité accréditée. Le Conseil - compte tenu du fait qu'il n'a pas accrédité les Teamsters à l'égard de l'unité de négociation de ce dernier et que ce syndicat n'a pas présenté de demande d'accréditation - ne peut pas statuer que les employés de la division du terminal doivent faire partie de la

As for Arnone's alternate request that there be only one certified bargaining unit encompassing all its employees, the Board - in determining an appropriate unit - will not insist on broad unit boundaries where an initial certification is involved, particularly if the effect of such a determination will frustrate the efforts of the employees to organize and to participate in collective bargaining. In this instance, the bargaining unit sought is found to be appropriate for collective bargaining and the certification application is granted.

relation de négociation qui existe entre Arnone et les Teamsters et être visés par la convention collective de ce syndicat.

Quant à l'autre demande d'Arnone selon laquelle il devrait y avoir une seule unité de négociation accréditée regroupant tous les employés, le Conseil - lors de la détermination d'une unité habile à négocier - n'insistera pas pour que l'unité englobe tous les employés s'il s'agit d'une première accréditation, tout particulièrement si ce choix a pour effet de faire obstacle aux efforts des employés qui veulent se syndiquer et participer à la négociation collective. Dans la présente affaire, l'unité de négociation visée est jugée habile à négocier collectivement, et la demande d'accréditation est agréée.

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LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Communications, Energy and Paperworkers
Union of Canada,

applicant,

and

Arnone Transport Limited,

employer.

Board File: 18341 (555-4231)
CLRB/CCRT Decision no. 1220
February 12, 1998

The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Mr. Michael Eayrs and Ms. Roza Aronovitch, Members.

Appearances (on record)

Ms. Melissa J. Kronick, for Communications, Energy and Paperworkers Union of Canada; and

Mr. Christopher D.J. Hacio, for Arnone Transport Limited.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

This case deals with a certification application filed by the Communications, Energy and Paperworkers Union of Canada (the "CEP") to represent a unit of employees of Arnone Terminals Limited. As more fully explained below, following a recent merger, this company is now Arnone Transport Limited.

Arnone Transport Limited is a general freight trucking company providing full load and less than full load freight services within and, on a regular basis, between the provinces of Ontario and Manitoba, as well as full load services in the Great Lakes region and in the Northeastern United States. Its head office is located in Thunder Bay, Ontario. Arnone Transport also operates a large commercial storage and handling facility in Thunder Bay, offering forklift and crane services, load transfers to and from trucks and railcars, and short and long term storage.

At the time this application was filed on September 23, 1997, Mr. Len Arnone had complete ownership of Arnone Terminals Limited ("Arnone Terminals") and virtually full control of Arnone Transport Limited ("Arnone Transport"). There exists another Arnone enterprise, namely Arnone Superior Moving Inc. ("Arnone Moving"), 50% of which is owned by Arnone Transport. Arnone Moving operates independently from the other companies and its employees are represented by the Teamsters in a separate bargaining unit. The present application does not concern this latter company.

On September 4, 1997, the CEP filed an application for certification as bargaining agent with the Ontario Labour Relations Board (OLRB) for a unit of employees who worked in the terminal operations of Arnone Transport. The respondent employer argued before the OLRB that its operations fell under federal jurisdiction. In light of the position adopted by Arnone Terminals, the CEP filed the present application before the Canada Labour Relations Board. The OLRB is holding the provincial certification application in abeyance pending the outcome of this application.

In the interim, Arnone Transport and Arnone Terminals entered into an agreement to merge the two companies. The amalgamation came into effect on September 26, 1997, with the name of the amalgamated company being Arnone Transport Limited.

The Board considers it important to determine certification applications as expeditiously as possible and did so after receiving the parties' final submissions and supplementary report of the Board's labour relations officer. Following its

consideration of the facts and the parties' representations, the Board granted the application and issued a certification order with reasons to follow. These are the reasons.

I

The Board's constitutional authority to deal with labour relations is dependent upon a finding that the company's activities meet the definition of "federal work, undertaking or business" as set out in section 2 of the Code:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

...

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, ..."

While the transportation division of Arnone Transport operates interprovincially, the certification application as originally filed by the CEP was for a unit of employees of Arnone Terminals and not Arnone Transport. Despite the merger of Arnone Terminals and Arnone Transport and notwithstanding the fact that the parties do not dispute the Board's jurisdiction, the Board must nevertheless determine whether or not Arnone

Transport operates an integrated interprovincial trucking company such that its terminal operations come under federal jurisdiction.

The issue of whether an undertaking, service or business is a federal one depends on the nature of its operations. To determine this question, we must examine the "normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors" (see Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115).

The employer's business is comprised of three sectors of activities: the transportation division which is engaged in the transport of freight both locally and on a regular basis interprovincially; a garage division whose employees service the equipment for Arnone Transport; and the terminal storage division which is primarily involved in storage and in rail and truck transfers.

The evidence reveals that all divisions work hand in hand to carry out the transportation business. There is a centralized direction and coordination at the management level. The controller, maintenance manager, marketing manager, transport manager and terminal manager meet regularly to discuss the global operations of Arnone Transport and to ensure that all operations work together towards a common goal. In particular, capital expenditures and other financial matters as well as issues such as hiring, training, wages, benefits, working hours, disciplinary matters for all divisions are dealt with at these meetings. Furthermore, the administration of Arnone Transport Limited as well as its customer services are carried out at a central office.

In light of the foregoing and in particular the centralization of the company's decision-making authority, administration, and the provision of customer services, the Board finds that Arnone Transport operates a single integrated trucking company. Given the regular interprovincial transportation that it carries out, the Board concludes that this company constitutes a federal work, undertaking or business within the meaning of

section 2(b) of the Code. Consequently, the terminal storage division as well as its labour relations, being unseverable from the rest of the employer's operations, come within federal jurisdiction.

II

The employees who work in the transport and garage division are represented by Teamsters Local 939 (the "Teamsters"). Arnone Transport voluntarily recognized the Teamsters in 1968 to represent its employees, and both the garage employees and truck drivers are covered by a collective agreement concluded by those parties. However, the employees working in the terminal division have never been represented by the Teamsters nor sought by them for certification. It is this group of employees who are the subject of the CEP's certification application.

In response to the application, the employer requested a hearing to determine the appropriate bargaining unit and the effect of the merger on the certification application, and to decide the issue of whether the CEP is the appropriate union to represent the employees, formerly of Arnone Terminals, or whether the more appropriate union is the Teamsters.

Parties frequently request a public hearing in certification applications. However, it is a well-established practice of this Board to dispose of such applications on the basis of the documentation on file and the parties' representations, without public hearings. While the employer is an interested party with respect to the appropriateness of the bargaining unit, questions dealing with this issue are not questions of law that must be resolved at a quasi-judicial hearing. Rather, they are factual considerations that can be dealt with adequately through the parties' written submissions supplemented by a report from a Board officer (see Alberta Wheat Pool (1991), 86 di 172 (CLRB no. 907)).

This practice has been challenged on many occasions before the Federal Court of Appeal on the grounds of a denial of natural justice. All cases in this regard have been dismissed by the courts, which have held that the Board is not obliged to hold hearings in certification files and can base its decision solely on the parties' written submissions (see Canadian Arsenal Limited v. Canada Labour Relations Board [1979] 2 C.F. 393; Vancouver Wharves Ltd. v. International Longshoremen's and Warehousemen's Union, Local 514 (1985), 60 N.R. 118 (F.C.A.); and Alberta Wheat Pool, supra).

As for the employer's request that a hearing be held to determine which union would be more appropriate to represent the employees affected by this application, the issue of representation is not one which is of any concern of the employer. The role of an employer with respect to certification proceedings is a limited one: it is restricted to questions relating to the appropriateness of the bargaining unit and inclusions and exclusions therefrom. The question of whether employees are to be represented by a trade union and the choice of the bargaining agent are issues for the employees themselves to decide. An employer not only has no interest or standing with respect to such a question but is specifically precluded by the Code to interfere in any way in the representation of employees by a trade union (see Bank of Nova Scotia (Cedarbrae Plaza) (1985), 62 di 190 (CLRB no. 533); Loomis Armored Car Service Ltd. et al. (1983), 51 di 185 (CLRB no. 408); and Transport V.A. Inc. (1994), 95 di 1 (CLRB no. 1077)).

III

The employer submits that as a result of the merger of Arnone Terminals Limited and Arnone Transport Limited on September 26, 1997, Arnone Transport has become the employer of the former Arnone Terminals employees. It considers that these employees should now come under the terms of the collective agreement concluded

between Arnone Transport and the Teamsters. Furthermore, in the employer's view, since two of the three "Arnone corporations" have entered into collective agreements with the Teamsters, the Teamsters should also represent the employees of its terminal operations. Accordingly, the employer asks that the application presented by the CEP be dismissed. Alternatively, if the Board issues a certification order, the employer wants the Board to find one bargaining unit to be appropriate for collective bargaining and order a representation vote.

While the employer may wish to deal with only one trade union, the Board cannot include the employees of the terminal storage division in the collective agreement in effect between Arnone Transport and the Teamsters, as requested by the employer nor can it do so proprio motu. The collective bargaining relationship between Arnone Transport and the Teamsters stems from voluntary recognition and not from a Board order. Furthermore, as indicated above, the Teamsters have neither sought to have those employees who work in the employer's terminal operations covered by their collective agreement nor have they sought to obtain certification for this group.

The Board can only modify a voluntarily recognized bargaining unit and include employees in such a collective bargaining relationship in the context of an application, pursuant to section 18 of the Code, seeking a review of the bargaining unit structure, which includes at least one certified unit. As the Board stated in BTS Byers Transportation Systems Inc. et al. (1993), 91 di 69 (CLRB no. 995):

"... the Board has said that it matters not if some of the bargaining agents affected by review applications such as this were voluntarily recognized. Provided there is at least one certification order of the Board in the picture which is subject to an application for review, the Board's powers to determine the appropriateness of bargaining units and to include or exclude employees from a bargaining unit under sections 16(p)(v) and 27 of the Code prevail. ..."

(page 76)

The foregoing circumstances, however, are not present in this instance. The Board - not having certified the Teamsters for its bargaining unit and in the absence of a certification application from that union - cannot determine that the employees of the terminal division are to be included in the bargaining relationship existing between Arnone Transport and the Teamsters and covered by their collective agreement.

In the alternative, the employer requests that there be one certified bargaining unit encompassing all the employees of Arnone Transport. According to the employer, there is considerable intermingling of the employees of the Teamsters' bargaining unit and the terminal operations, particularly with respect to forklift operators and mechanics who are employed at both the trucking and terminal operations.

In essence, the employer is asking that the Board - in certifying a unit of employees - review the existing Teamsters' bargaining unit and create a single unit comprising all transport and terminal operation employees.

It is clear that the determination of appropriateness is the preserve of the Board. However, the CEP has not applied for a unit which impinges upon the Teamsters' unit and, prior to determining whether the bargaining unit boundaries should be broadened, the Board must first consider the appropriateness of the unit sought. In this context, the role of the Board is to determine an appropriate unit and not the most appropriate one (see Purolator Courier Ltd. (1989), 77 di 1 (CLRB no. 730); and Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726)). Consequently, the Board will not insist on broad unit boundaries where an initial certification is involved, particularly if the effect of such a determination will frustrate the efforts of the employees to organize and to participate in collective bargaining. This principle was expressed by the Board in Air Atonabee Limited c.o.b. as City Express/Cité Express, August 5, 1986 (LD 554):

"The panel's decision is that while it may agree that an all employee unit may be the most appropriate unit to convenience the employer's

operations, that issue is outweighed by the more important consideration of affording a meaningful opportunity to the flight attendants to exercise their rights under the Code to participate in collective bargaining. The concerns of the employer about its practices of cross utilization is something that can be negotiated and the panel is convinced that it ought not to frustrate the rights of the flight attendants under the Code by insisting upon artificial or unnecessary bargaining unit configurations only because a lesser unit might inconvenience the employer. The Board therefore accepts the bargaining unit of flight attendants as an appropriate unit for the purposes of collective bargaining."

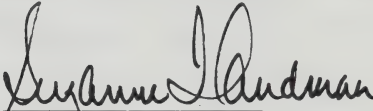
(page 4; reproduced in Purolator Courier Ltd., supra, at page 7)

In the present case, a review of the evidence shows that a terminal manager is responsible for the day-to-day operations of the terminal division. With respect to the question of intermingling of the terminal storage employees and transport employees, the evidence on file, based upon time cards and other documentation, fails to substantiate the employer's allegations of intermingling. Any exchange of employees is sporadic. The employees at the terminal are primarily involved in storage activities while the employees of the transport operation are primarily involved in driving trucks. Given the foregoing factors together with the evident community of interest amongst the employees of the terminal division and the wishes of these employees, the Board considers that the bargaining unit sought is, in fact, appropriate for collective bargaining.

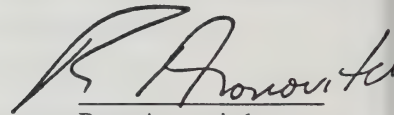
IV

The Board, having verified the trade union status and the representative character of the applicant union, and satisfied as to the applicant's majority support as of the date of the certification application, issued a certification order, certifying the CEP as the bargaining agent for the unit described as follows:

"All employees of Arnone Transport Limited in the City of Thunder Bay, Ontario, working in its terminal division, excluding those represented by another bargaining agent, the secretary, assistant manager/secretary, manager, and those above."


Suzanne Handman
Vice-Chair


Michael Eayrs
Member


Roza Aronovitch
Member

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Summary

Mike Schembri et al., *applicants*, Can-Ar Transit Services, Division of Tokmakjian Limited, *employer*, and Amalgamated Transit Union, Local 1587, *bargaining agent*.

Board File: 18066 (566-29)
CLRB/CCRT Decision no. 1221
March 16, 1998

This application seeking to terminate the bargaining rights of the Amalgamated Transit Union, Local 1587 (the "ATU"), is the third such application presented by the employer's transit workers; the last application having been dismissed in April 1996 on the grounds of employer influence.

The union contended that the application was inadmissible given the applicants' failure to provide the date on which each employee signed the petition, as required by section 28 of the Board's regulations. The Board considers that the failure to provide this information amounts to a defect of form foreseen by section 114 of the Code which may be cured, rather than a substantive defect.

As for the merits, the evidence shows a history of strained labour relations between the parties, unanswered questions regarding the payment of the applicants' legal fees, the questionable role played by an employee who had been an active participant in a prior revocation application, open solicitation on company premises, and preferential treatment of the principal applicant by the employer.

Résumé

Mike Schembri et autres, *requérants*, Can-Ar Transit Services, division de Tokmakjian Limited, *employeur*, et Syndicat uni du transport, section locale 1587, *agent négociateur*.

Dossier du Conseil: 18066 (566-29)
CLRB/CCRT Décision n° 1221
le 16 mars 1998

La présente demande en vue d'obtenir la révocation des droits de négociation du Syndicat uni du transport, section locale 1587, (le «SUT»), est la troisième que présentent les travailleurs du transport de l'employeur; la dernière demande a été rejetée en avril 1996 en raison de l'influence de l'employeur.

Le syndicat soutient que la demande est irrecevable du fait que les requérants n'ont pas fourni la date à laquelle chaque employé avait signée la pétition, comme l'exige l'article 28 du Règlement du Conseil. Le Conseil estime que le fait de ne pas fournir ce renseignement équivaut à un vice de forme visé à l'article 114 du Code qui peut être corrigé, plutôt qu'un vice de fond.

Quant au bien-fondé de la demande, la preuve révèle un passé de relations du travail tendues entre les parties, des questions sans réponse concernant le paiement des frais d'avocat des requérants, le rôle discutable d'un employé qui avait participé activement à une demande de révocation antérieure, la sollicitation ouverte dans les locaux de l'entreprise et le traitement préférentiel accordé au principal

The circumstantial evidence leads the Board to conclude that the petition had the approval and support of the employer. Consequently, the Board is not satisfied that a majority of employees in the bargaining unit no longer wish to be represented by the ATU and dismisses the application.

requérant par l'employeur.

La preuve circonstancielle amène le Conseil conclure que la demande avait l'approbation et l'appui de l'employeur. Par conséquent, le Conseil n'est pas convaincu qu'une majorité des employés compris dans l'unité de négociation ne veulent plus être représentés par le SUT et rejette la demande.

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Reasons for decision

Mike Schembri et al.,

applicants,

and

Can-Ar Transit Services, Division of
Tokmakjian Limited,

employer,

and

Amalgamated Transit Union, Local 1587,

bargaining agent.

Board File: 18066 (566-29)
CLRB/CCRT Decision no. 1221
March 16, 1998

The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Messrs. Michael Eayrs and David Gourdeau, Members. A hearing was held on October 28-30, 1997 at Toronto.

Appearances

Messrs. Mike Schembri and Tony Nero, on behalf of the applicants;

Mr. Christopher C.E. Eames, for the employer; and

Mrs. Elizabeth M. Mitchell, bargaining agent.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

These reasons for decision concern an application presented by a number of employees of Can-Ar Transit Services, Division of Tokmakjian ("Tokmakjian" or the "employer") for an order to terminate the bargaining rights of the Amalgamated Transit Union, Local 1587 (the "ATU" or the "union"). This is the third revocation application presented by the employees of Tokmakjian. The last application - which also sought to terminate the ATU's bargaining rights - was dismissed in April 1996 on the grounds of employer interference (see Can-Ar Transit Services, Division of Tokmakjian Limited (1996), 103 di 29 (CLRB no. 1188)).

While such applications are generally determined on the basis of the parties' written submissions together with the report of the Board's officer, the Board decided to hold a public hearing in the present case since the union again raised allegations of employer interference.

I

The applicants are full-time transit drivers employed by Tokmakjian, which has been operating a transit service since 1985. Tokmakjian, having acquired the transit contract from the Town of Vaughn, became a successor employer and party to the collective agreement with the Canadian Brotherhood of Railway, Transport and General Workers (the "CBRT"). In 1986, the employees applied for and obtained the decertification of the CBRT and thereafter formed an employee association (the "Association"), which was voluntarily recognized by Tokmakjian.

The Association was certified by the Ontario Labour Relations Board in 1991 and merged with the ATU in 1995. Following this merger, the ATU applied to the Ontario Labour Relations Board with respect to its status as a successor trade union and, as a result of a jurisdictional dispute with Tokmakjian, it applied to the Canada Labour Relations Board. In the interim, one of ATU's organizers was dismissed by the employer. On November 7, 1995, this Board - having determined that Tokmakjian's operations fall under federal jurisdiction - found the ATU to

have succeeded the Association as a voluntarily recognized bargaining agent. The ATU immediately served notice to bargain and the following month, Mr. McDougall, an employee of Tokmakjian, began circulating a petition to terminate the ATU's bargaining rights. That application was dismissed in April 1996 (see Can-Ar Transit Services, Division of Tokmakjian Limited, supra).

The parties concluded a collective agreement in the fall of 1996 for the period commencing June 1, 1996 to June 30, 1997. On April 1, 1997 the union served notice to bargain and on April 17, 1997 the present application to terminate the ATU's bargaining rights was filed.

II

Mr. Mike Schembri was the principal proponent of the present petition to terminate the ATU's bargaining rights. He testified that the petition originated with his dissatisfaction with the union. The ATU had made a number of promises with respect to benefits, shifts, union meetings and union dues, which had not materialized. He also reproached the union for not having filled a vacant union position, and for not having forced the employer to distribute extra work to full-time drivers rather than to part-time employees.

Mr. Schembri stated that many of the employees shared his views and considered they would be better off if they negotiated on their own. A group of them decided to apply to the Board to terminate the ATU's bargaining rights. Mr. Schembri assumed responsibility for the process and had a petition drafted. In early April 1997, he contacted an attorney and thereafter began to circulate the petition. He was assisted in this endeavour by Mr. Tony Nero who informed other employees of the petition.

Mr. Schembri obtained the first signatories on April 6, 1997 and the last on April 16, 1997. He told the Board that he had not discussed the petition or solicited any

signatures at the workplace. To substantiate his testimony, he presented a document entitled "Sign Up Place", which listed those employees who had signed the petition, as well as the date and place of signature. This document shows the petition as having been signed at a number of locations, none of which are situated on company premises.

Mr. Schembri collected \$10.00 from the signatories of the petition as a down payment for their legal expenses and advised them that the balance would be remitted at the end of the case by means of monthly payments. As he explained, an employee association would be formed and its monthly dues would be used to pay for the legal fees incurred. Mr. Nero, however, knew little of this association. He did not recall when the idea originated nor did he know the amount of monthly fees that would be payable. He also was not aware whether other employees had been told about the establishment of an association and had not canvassed any of them to determine their support.

On April 17, 1997, the day before presenting their application to the Board, Mr. Schembri together with Mr. Nero and Mr. Briganti met with counsel and signed a retainer. When counsel for the union presented him with a signed copy dated April 24, 1997, Mr. Schembri told the Board that the question of a retainer had in fact been discussed on April 17, but he had received the actual form to be signed by mail. He had two further meetings with counsel, the last one being the week prior to the hearing. Mr. Nero, on the other hand, said he first met with legal counsel the week prior to the hearing. Although a signatory to the retainer, Mr. Nero did not know how much their legal fees would amount to nor had he asked.

Mr. Schembri was cross-examined at length on various issues, one of which concerned his contact with Mr. O'Day, an employee absent from work on long-term disability leave, who had been actively involved in the previous application to terminate the ATU's bargaining rights. Mr. Schembri, while denying that

Mr. O'Day advised him as to how to proceed, had met with him on two occasions - before and after the petition was signed - and had discussed the petition on one of these occasions.

Another issue concerned Mr. Schembri's hours of work. Mr. Schembri claimed to have received fewer hours in 1997 than in 1996. However, his time sheets show that in the months prior to the petition, namely November 1996 to May 1997, Mr. Schembri had not worked extra shifts, while in the ensuing period of May 15 to October 1997 he had worked 11 extra days. Mr. Schembri maintained that he was treated in the same manner as the other employees who had the opportunity to sign for extra hours. According to Mr. Schembri, he was called upon to perform extra work since he was available and willing to replace drivers who failed to show up for work.

Virtually all of Mr. Schembri's testimony was contradicted by Ms. Linda Romijn. While Mr. Schembri had voiced his discontent with the ATU on a number of occasions and had spoken to her about obtaining better wages and benefits without the union, their discussions took place on company premises. In Mr. Schembri's presence, she had a similar discussion at work with Mr. Nero who also maintained they would be better off without the union and had asked her to trust him. Although nothing existed in writing, both Mr. Schembri and Mr. Nero claimed they could make \$18 an hour - rather than their current hourly rate of \$16.50 - if there was no union.

During the week of April 7 to April 11, 1997, Ms. Romijn met Mr. Schembri when she reported to work in the afternoon and signed the petition in the hallway between the drivers' room and the dispatch office. When Mr. Schembri asked her for the sum of \$10.00 to retain counsel, Ms. Romijn expressed her concern that it would not be sufficient to cover their legal costs. She was told not to worry about the balance of payments. Mr. Schembri said "we're paying it". She testified that - prior to the Board's hearing - she had never been advised that she would be

required to pay a monthly amount towards their legal fees. Other witness were equally unaware of the means foreseen for paying these fees.

As for the question of working hours, Ms. Romijn claimed that because Tokmakjian tries to avoid scheduling overtime, extra shifts are difficult to obtain. Since April 1995, she had been offered only one-half shift of supplementary work.

The remainder of the evidence concerned the union's activities at Tokmakjian. A negotiating committee had been established in 1996 for the last round of negotiations. Meetings were held in the fall of 1996 with respect to the employer's proposals and, after the collective agreement was signed in December 1996, meetings were scheduled monthly - beginning in March 1997 - except for the summer period. According to Mr. George Lowden, a union representative, at the March 1997 meeting, the union called for candidates to fill a position that had become vacant. Mr. Lowdon and Mr. Schembri differ in their recollection of this meeting. According to Mr. Lowdon, Mr. Schembri indicated he would consider the position while Mr. Schembri denied he ever contemplated acting as a union representative.

Mr. Lowdon provided explanations for various issues raised by the bargaining unit employees during the preceding year and indicated what action had been taken. In particular, two grievances had been filed in response to the complaints concerning the allocation of extra hours to part-time rather than to full-time employees.

III

The applicants claim their application was filed as a result of employee dissatisfaction with the union and point to various examples, including the lack of resolution regarding the contentious issue of extra hours being awarded to part-time employees. The applicants maintain the evidence has failed to reveal employer involvement and deny any favoritism by Tokmakjian towards Mr. Schembri. Given

the lack of employer interference, they request that the Board terminate the ATU's bargaining rights or, alternatively, order a vote.

Counsel for the union submits that the petition is fundamentally defective and should be rejected on the ground that it does not contain the date on which each employee signed, contrary to section 28(3) of the Canada Labour Relations Board Regulations, 1992.

As for the merits, counsel challenges various aspects of the applicants' testimony and requests that the application be dismissed, claiming no satisfactory evidence was provided to show that management was not involved.

IV

An application to terminate a trade union's bargaining rights must meet certain requirements. It must be made by an employee in the bargaining unit, within the time limits prescribed by the Code, and without interference by the employer. Additional requirements come into play in the case where a first collective agreement has not yet been concluded (see Jean-Claude Harrison et al. (1983), 53 di 85; and 4 CLRBR (NS) 258 (CLRB no. 417); and Uli Henssler et al. (1997), 38 CLRBR (2d) 96; and 98 CLLC 220-003 (CLRB no. 1211)).

While the application itself was filed in a timely manner, the union has raised a procedural issue, namely the applicants' failure to provide the date on which each employee signed the petition, as required by section 28 of the Board's Regulations, and maintains this defect renders the application inadmissible. Section 28 of the Regulations states:

"28. (1) An application made by an employee pursuant to section 38 of the Act shall contain:

...

(2) An application referred to in subsection (1) shall be accompanied by a separate and confidential statement, signed by each employee whom the applicant claims to represent, stating that they do not wish to be represented by the bargaining agent and authorizing the applicant to act on their behalf.

(3) The statement described in subsection (2) shall show the date on which each employee signed the statement, and that date shall be not more than six months prior to the date on which the application is filed."

It is clear that certain criteria are mandatory and failure to comply will be fatal to the application, as for example the timing of a revocation application or its submission by a bargaining unit employee. However, the failure to file all the information set out in section 28 of the Regulations, in the Board's view, amounts to a defect of form, foreseen by section 114 of the Code, rather than a substantive defect. An irregularity of this nature may therefore be cured. Accordingly, the requisite information may be obtained via an amendment to the proceedings by virtue of section 16(n) of the Code, through a supplementary investigation or from a hearing.

In the present case, the evidence adduced at the hearing established the date at which each signatory to the petition signed and reveals that the signatures are not stale dated. Accordingly, counsel's arguments regarding the inadmissibility of the application is dismissed.

V

The employees who testified on behalf of the applicants all claimed they were unhappy with the union and its representation of them.

The evidence, however, shows that the ATU actively exercised its bargaining rights. Once its status was confirmed by the Board in April 1996, it began to negotiate, involving the bargaining unit employees in the process. Following the

execution of a collective agreement, union meetings were held on a regular basis and attempts were made to fill a vacant position. The union responded to members' complaints concerning Tokmakjiian's failure to distribute overtime and extra work to bargaining unit members by filing grievances. In short, this is not a case where the trade union has ignored its members.

Notwithstanding a union's efforts to effectively carry out its duties, bargaining unit employees may nevertheless decide they do not want union representation. The Board does not require that employees provide reasons for a revocation application. In fact, it suffices for them to say they no longer wish to be represented by their union. However, where there are allegations of employer influence, as in the present case, it is important to determine whether there were any circumstances or actions that influenced the employees' decision to submit such an application (see Jean-Claude Harrison et al., *supra*; and Joseph Szabo and Jaro Jarkovsky (1977), 25 di 345; and [1978] 1 Can LRBR 161 (CLRB no. 103)). Specifically, the Board must determine whether the applicants truly wish to revoke their union's bargaining rights and have acted of their own free will or whether their application came about as a result of employer interference.

In determining whether employer domination or influence exists, the principles enunciated in Royal Oak Mines Inc. (1993), 92 di 153; and 93 CLLC 16,063 (CLRB no. 1028), in the context of certification applications - namely that the relationship between the trade union and the employer must be at arm's length - **are** equally applicable to revocation applications:

"... The threshold test to be applied in this jurisdiction, much like in all provincial jurisdictions, in order to determine if a trade union is dominated or unduly influenced by the employer, is whether there exists the proper arm's length relationship between the trade union and the employer. ..."

(pages 158-159; and 14,506)

The relationship between the applicants of a revocation application and the employer must be one of total independence. Moreover, it must also be perceived as such by the other employees. This requirement in the context of a union - employer relationship has been described in Graham Cable TV/FM (1986), 67 di 57; 14 CLRBR (NS) 250; and 86 CLLC 16,047(CLRB no. 588), as cited in Royal Oak Mines Inc., supra:

"... In order for a trade union to function as such, there must be a proper arm's length relationship between itself and the employer and not only must that arm's length relationship exist, it must be seen to exist in the eyes of its employees. ... (pages 73, 267; and 14,448; emphasis added)"

(pages 160; and 14,507)

As for the evidence required in cases of allegations of employer domination or influence, the Board will rely on circumstantial evidence since direct evidence is rarely available:

"In this type of case, as in cases of dismissal for union activities, we do not expect to receive direct evidence that the employer has dominated, influenced or initiated the establishment of a Union, or that the dismissal is related to an employee's union activity. In such cases, we must base our decision on our assessment of the circumstantial evidence which is submitted to us. It is only in exceptional cases, as we have just mentioned, that direct evidence will be available. ..."

(Cabano Transport Ltd. (1981), 42 di 318 (CLRB no. 294), pages 333-334)

VI

The Board has little doubt that Tokmakjian prefers that its employees form an employee association. When unions such as the ATU appear on the scene, revocation applications have surfaced. That was the case in 1986 after Tokmakjian,

having acquired the Town of Vaughn's transit contract, became the successor employer of employees represented by the CBRT. The employees applied to have the CBRT's certification revoked. Following the decertification of that union, an employee association was formed which received voluntarily recognition by Tokmakjian. However, when the association merged with the ATU and the latter union sought to have its status determined by the OLRB, the employer contested that Board's jurisdiction and dismissed a union officer. Once the ATU was declared by this Board to be a successor union, another revocation application was presented by the bargaining unit employees. Within a year of the dismissal of the last revocation application, the present application was filed. While the current application must be determined on the facts pertaining to this case, the background is nevertheless one of the elements that the Board may look to in determining the voluntariness of the petition.

In the present instance, although the origin of the petition is not clear, there is no question that Mr. Schembri assumed a leading role in every phase of the process. After the petition was drafted, he began soliciting signatures. The Board concludes from the evidence that this soliciting took place not only outside the workplace as Mr. Schembri maintained but on company premises and during working hours as well. Given the fact that Mr. Schembri was able to move about freely with the petition at the workplace, it is most likely that Mr. Schembri's efforts to have the ATU's bargaining rights revoked would be viewed by other employees as having either the express or tacit approval of Tokmajian.

We question the participation of Mr. O'Day who was actively involved in the previous petition. Although the applicants denied that he had provided them with advice, Mr. Schembri nevertheless met with him and discussed the petition.

Of greater concern is the lack of clear evidence with respect to the arrangements between the applicants and the solicitor they retained and the payment of their legal fees. The evidence concerning the date and place the retainer was signed is

contradictory. On one hand, Mr. Schembri said it was completed when the applicants met with counsel, but subsequently said it was sent by mail and signed after their meeting.

As for the applicants' legal fees, Mr. Schembri's assertion - that everyone had been told that the balance would be paid from the monthly dues of an employee association to be formed - is not substantiated by the testimony of other witnesses. Neither Ms. Romijn nor other employees were aware of this planned association or of this intended method of paying their legal account. Mr. Nero, although having signed the retainer, had no knowledge of the legal fees payable nor had he asked. In sum, the payment of the applicants' legal fees remains highly questionable.

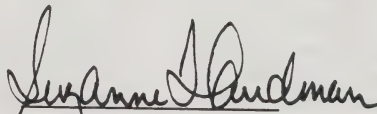
Other aspects of concern for the Board relate to the issue of favours. Following the presentation of the petition, Mr. Schembri enjoyed a significant increase in the number of extra hours of work performed despite the employer's practice of severely restricting overtime opportunities and extra work. While Mr. Schembri claimed he is called when employees are ill because of his availability and willingness to work, the fact remains that he was not called by the employer to perform extra work in the months preceding the petition. In such circumstances, where supplementary work is rarely provided by Tokmajjian to bargaining unit members, the inference that may be drawn is that Mr. Schembri was rewarded for his anti-union activity.

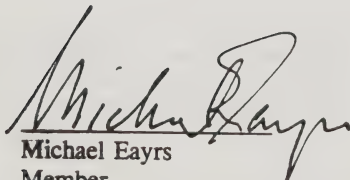
An analysis of the foregoing shows a history of strained labour relations between the parties, unanswered questions regarding the payment of the applicants' legal fees, the questionable role of Mr. O'Day who had been an active participant in the prior revocation application, open solicitation on company premises, and preferential treatment by the employer of the principal applicant. While there is no direct evidence as to employer involvement in the application, the circumstantial evidence leads us to conclude that the petition had the approval and support of the

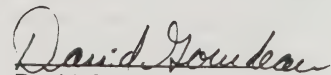
employer. In view of all these elements, the Board is not satisfied that the petition truly reflects a desire by the majority of the employees in the bargaining unit to terminate the ATU's bargaining rights.

The Board is aware of the effort, time and expense that the applicants and sponsors of the petition have put into this case. It may well be that a number of employees are dissatisfied with their current bargaining agent and the representation it has provided. However, the Board's role in revocation applications is to ascertain whether the petition represents the voluntary expression of the true wishes of the employees in the bargaining unit and, in this regard, the application must be determined on the evidence before the Board and not on extraneous considerations. In light of the evidence, the Board finds that the applicants have not met the onus of establishing the voluntary nature of their petition and cannot conclude that a majority of the employees in the bargaining unit no longer wish to be represented by the ATU.

Accordingly, the application to terminate the ATU's bargaining rights is dismissed.


Suzanne Handman
Vice-Chair


Michael Eayrs
Member


David Gourdeau
Member

information

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Summary

Syndicat des débardeurs de Trois-Rivières, (CUPE 1375), *applicant*, Maritime Employers Association, *employer*, and Les Élévateurs des Trois-Rivières (division of ULS Corporation) and Syndicat des travailleurs des Élévateurs de Trois-Rivières - CNTU, *mis-en-cause*.

Board File: 17866
CCRT/CLRB Decision no. 1222
April 21, 1998

Résumé

Syndicat des débardeurs de Trois-Rivières, (SCFP 1375), *requérant*, Association des employeurs maritimes, *employeurs*, ainsi que Les Élévateurs des Trois-Rivières (division de ULS Corporation) et Syndicat des travailleurs des Élévateurs de Trois-Rivières - CSN, *mis en cause*.

Dossier du Conseil: 17866
CCRT/CLRB Décision n° 1222
le 21 avril 1998

The winch used in unloading ships at the port of Trois-Rivières is operated from a remote control box connected by an electrical wire. Until 1993, a longshoreman on the wharf operated the winch, but in 1993, for reasons deemed legitimate by all parties involved, the electrical wire was lengthened, and the winch's control box has since been mounted inside the cab of the marine tower located on the wharf.

The Syndicat des débardeurs de Trois-Rivières (CUPE) claimed that the new operator must belong to its bargaining unit which falls within the jurisdiction of its geographical certification.

The Syndicat des travailleurs des Élévateurs de Trois-Rivières (CNTU), whose bargaining unit constitutes an enclave within this geographical certification of CUPE, claimed on the contrary that winch and marine tower operations are now integrated and fall within the jurisdiction of a single work station, namely, that of the marine tower operator (CNTU).

Le treuil servant au déchargement des navires au port de Trois-Rivières est actionné à partir d'une boîte de contrôle à distance reliée par fil électrique. Jusqu'en 1993 un débardeur sur le quai actionnait le treuil mais depuis 1993, pour des raisons jugées légitimes par toutes les parties en cause, le fil électrique a été allongé pour que la boîte de contrôle du treuil soit montée à l'intérieur de la cabine de la tour marine située sur le quai.

Le Syndicat des débardeurs de Trois-Rivières (SCFP) prétend que le nouvel opérateur doit faire partie de son unité de négociation qui relève de son accréditation géographique.

Le Syndicat des travailleurs des Élévateurs de Trois-Rivières (CSN), dont l'unité de négociation constitue une enclave dans cette accréditation géographique de la SCFP, prétend au contraire que les opérations du treuil et de la tour marine sont aujourd'hui intégrées et relèvent d'un seul poste de travail, soit celui de l'opérateur de la tour marine (CSN).



After a careful analysis of guidelines to determine which of the two bargaining units is affected, the Board noted that both units qualify as involving longshoring activities. However, the new operation does not constitute a task that requires the full attention of one employee, but rather is merely an incidental part of the duties of the marine tower operator. The two operations are therefore part of the indivisible whole of the intentional scope of the CNTU's bargaining certificate.

Après une analyse approfondie des principes servant à aider le Conseil à déterminer laquelle des deux unités de négociation est visée, le Conseil note que les deux unités se qualifient comme mettant en cause des activités de débardage. Cependant, la nouvelle opération ne constitue pas une tâche qui requiert toute l'attention d'un employé, mais représente plutôt une partie accessoire des tâches de l'opérateur de la tour marine. En conséquence, les deux fonctions font partie d'un tout indivisible de la portée intentionnelle du certificat d'accréditation de la CSN.

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Reasons for decision

Syndicat des débardeurs de Trois-Rivières,
(CUPE 1375),

applicant,

and

Maritime Employers Association,

employer,

Les Élévateurs des Trois-Rivières (division of
ULS Corporation) and Syndicat des travailleurs
des Élévateurs de Trois-Rivières - CNTU,

✓ *mis-en-cause.*

Board File: 17866

CCRT/CLRB Decision no. 1222

April 21, 1998

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, and Ms. Sarah E. FitzGerald and Ms. Roza Aronovitch, Members.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chair.

I. INTRODUCTION

On January 20, 1997, the Syndicat des débardeurs du Port de Trois-Rivières, Local 1375, CUPE (hereinafter "CUPE"), filed an application with the Board pursuant to section 65 of the Code.

CUPE is asking the Board to declare that the operation of the winch from the cab of the marine tower is covered by its geographic certification certificate for longshoring operations at the ports of Trois-Rivières and Bécancour.

II. FACTS

In his report, the senior labour relations officer summarized the history of the parties' dispute as follows:

"CUPE submits that it represents longshoremen in Trois-Rivières/Bécancour pursuant to its geographic certification. ... It submits that during the hearings held in 1991, the Board stated that the geographic certification issued to it is universal and general in nature.

CUPE submits that the winch has always been operated by a longshoreman, signaller or foreman who belongs to the geographic unit it represents. It submits that the collective agreement provides for the existence of the winch operator position, thereby confirming that the position is included in its bargaining unit. According to CUPE, the alumina unloading operations carried out by Les Élévateurs des Trois-Rivières, including those involving the winch operator position, are covered by its geographic certification.

In July 1993, Les Élévateurs des Trois-Rivières transferred the winch operator position (CUPE) to, or combined it with, the marine tower operator position (CNTU), which is covered by the CNTU's certification. During that time, the MEA did not assign anyone to work as a winch operator (CUPE), since the winch operator's work was being carried out by the marine tower operator (a member of the CNTU).

On or about July 28, 1993, CUPE filed a grievance (no. 66) denouncing this situation and asking that it be corrected. The grievance was referred to arbitration in May 1994. Hearings on the grievance were held in November 1994 and May, June and October 1996. On October 24, 1996, the last day of the hearing, the arbitrator stated that he had no jurisdiction to hear the case.

On October 30, 1996, CUPE, with the MEA's agreement, asked that the arbitrator stay his decision and informed him that the issue of the unit in which the winch operator position is included would be referred to the Board pursuant to section 65 of the Code."

(page 3; translation)

The Certifications

CUPE was certified by the Board to represent:

"all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the

geographic region comprised of the ports of Trois-Rivières and Bécancour."

(February 12, 1991, file no. 555-3208)

On April 9, 1992, CUPE and the Maritime Employers Association (hereinafter "the MEA") entered into a collective agreement, which expired on December 31, 1994. According to the officer's report, the parties have not yet renewed that agreement. Under clause 1.01 of the agreement, the MEA recognizes CUPE as the only bargaining agent for the employees covered by the agreement, without specifying the scope of the bargaining unit. However, article 19 of the agreement included the winch operator position in the list of longshoremen's positions as a job classification for Trois-Rivières and Bécancour.

The mis-en-cause union (the CNTU) was certified to represent:

"all employees of Les Élévateurs des Trois-Rivières (Division of ULS Corporation) working at its establishment at Trois-Rivières excluding office staff, supervisors and those above the rank of supervisor."

(January 8, 1991, file no. 555-3227)

On June 16, 1993, the CNTU and Les Élévateurs des Trois-Rivières entered into a collective agreement, which expired on May 10, 1997. Under clause 2.01 of that agreement, the employer recognizes the CNTU as the bargaining agent for the employees covered by the certification certificate issued by the Board on January 8, 1991. The agreement did not say anything else about the scope of the bargaining unit. However, the operator position was listed as a job classification in Schedule IV of the agreement.

Operation of the Winch

Generally speaking, the parties have admitted the following facts.

The winch was initially operated by the longshoremen assigned to unload ships. It was operated using a remote control box connected by an electrical wire. A longshoreman could use that device to operate the winch in order to take hold of power-operated equipment on the wharf and lower it into the hold of the ship. CUPE did not deny the MEA's statement that no longshoremen were ever assigned specifically to work as winch operators. The work was carried out by longshoremen who were CUPE members until the work was amended in 1993.

In 1993, the winch operation system was modified following an accident. More specifically, it was relocated to the cab of the marine tower. According to CUPE, the only change made to the winch was lengthening the electrical wire so that the control box could be placed inside the marine tower operator's cab. The MEA and the CNTU explained that this transfer was made for safety reasons. It is acknowledged that the marine tower is operated by an employee covered by the CNTU's certification certificate and that since 1993, that employee has also operated the winch.

In response to the Board officer's request for further information, the MEA clearly stated that the winch is operated by the marine tower operator on duty. The second marine tower operator, when taking over during a shift, sometimes operates the winch at the request of the first operator while that operator is still present. However, the employer does not specifically use a second operator to operate the winch as CUPE claimed in paragraph 14 of its reply of May 20, 1997. The MEA also stated that the winch is operated only in connection with the operations of Les Élévateurs des Trois-Rivières.

Articles 2.1 and 2.2 of the technical specifications for operating the winch describe the operating parameters. The MEA summarized them briefly as follows:

"... the marine tower operator starts the winch from the control panel in the marine tower and then operates it from the upper bridge of the marine tower, which, for safety reasons, is positioned so the operator can see the control panel in the cab."

(the MEA's submissions of November 11, 1997; page 2; translation)

The parties acknowledged that these changes were made for safety reasons and were justified in the circumstances.

III. POSITION OF THE PARTIES

The MEA submitted that the parties to this application acknowledged that the scope and wording of the CNTU's certification constitute an exception to CUPE's geographic certification. It also submitted that the parties acknowledged that the use of the marine tower is completely covered by the certificate granted to the CNTU.

In light of the foregoing, the MEA submitted that because of the technical changes, the few duties involved in operating the winch were added to the work of the marine tower operator, such that the winch and marine tower operations are now a single, integrated operation. It submitted that to keep industrial peace, the Board must find

that the winch and marine tower operations have been combined under the jurisdiction of a single work station, that of the marine tower operator (CNTU).

CUPE, for its part, argued that the winch used to be run by a longshoreman whose classification appeared in the collective agreement entered into with the MEA and is included in its bargaining unit. Since the changes, only the electrical wire was lengthened so that the control box can reach the marine tower. However, the box remains separate from the console of the marine tower. A second operator who is included in its bargaining unit and covered by its geographic certification should operate the winch.

The CNTU submitted that historically, all operations on land, on the wharf or in the facilities of Les Élévateurs des Trois-Rivières (including the marine tower) were carried out by employees represented by the CNTU, while operations on the boats were carried out by employees represented by CUPE. The CNTU argued that once the winch began to be operated from the marine tower, it was logical for the work to be carried out by the marine tower operator and for the position to remain within the intended scope of its certificate, as it always was.

In light of the foregoing, the CNTU asked the Board to dismiss CUPE's application and declare that operations involving the winch are part of the intended scope of its certification certificate.

IV. ISSUE

The only issue in this case is whether the operation of the winch, which is now carried out from the cab of the marine tower, is covered by CUPE's or the CNTU's certification certificate.

V. THE BOARD'S JURISDICTION

(1) General principles

Section 65(1) of the Code allows the Board to decide any question referred to it that relates to the identity of the employees bound by a collective agreement:

"65. (1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination."

The general principles that apply to a jurisdictional labour dispute between two bargaining agents certified under the Code are well established. It is generally recognized that the Board's role is to interpret certification certificates in order to identify the employees bound by the collective agreement. In Bell Canada (1982), 50 di 105 (CLRB no. 393), the Board stated the following on this point:

"Consequently, the solution to any jurisdictional conflict over the employer's assignment of a particular function to members of one of two unions lies in the interpretation of the certificates, which only the Board has the power to do, with a view to determining the functions that each of the unions is authorized to represent. This process makes it clear which of the two unions represents the function at issue, and at the same time, identifies the incumbents of that function, as well as the collective agreement by which they are bound. Thus by exercising its power to interpret the certificates that it has issued, and that it alone is authorized to do under section 119 [now section 18] of the Code, the Board can identify the employees bound by a collective agreement."

(pages 118-119)

See also Montreal Port Corporation (1993), 91 di 199 (CLRB no. 1008); Eastern Provincial Airways (1963) Limited (1978), 30 di 82; and [1978] 2 Can LRBR 572 (partial report) (CLRB no. 142); Radio CJYO - 930 Limited (1978), 34 di 617; and [1979] 1 Can LRBR 233 (CLRB no. 170); CJMS Radio Montréal (Québec) Ltée (1979), 34 di 803; and [1980] 1 Can LRBR 170 (CLRB no. 183); Télé-Métropole Inc. (1980), 41 di 286 (CLRB no. 270); Bell Canada (1981), 43 di 86; and [1982] 3 Can LRBR 113 (CLRB no. 300); and Northern-Loram Joint Venture (1985), 59 di 180; and 9 CLRBR (NS) 218 (CLRB no. 498).

Recently, the Board restated these principles and clearly set out the approach it takes in making such a determination:

"... In the case of a work jurisdiction dispute such as the present case, the arbitrator seized of a grievance pursuant to a collective agreement may not determine the matter with absolute finality since a conflicting arbitral award may arise from the competing collective agreement. In that respect, these are issues that the Board has the advantage of being able to decide with finality. Indeed the jurisprudence establishes beyond question that this section — and specifically the phrase 'identification of the... employees bound by a collective agreement' — gives the Board the jurisdiction to resolve

inter-union disputes over work jurisdiction (Eastern Provincial Airways (1963) Limited (1978), 30 di 82; and [1978] 2 Can LRBR 572 (partial report) (CLRB no. 142); Northern-Loram Joint Venture (1985), 59 di 180; and 9 CLRBR (NS) 218 (CLRB no. 498); and Canadian Pacific file no. CA 001 759, June 19, 1984, (B.C.C.A.)).

...
The Board's approach to these matters is quite straightforward. The Board interprets the scope clauses contained in the collective agreements in light of the actual duties which are in dispute and decides which collective agreement applies. If there is overlap between the two, the Board must decide which agreement will prevail."

(Ontario Hydro (1997), 105 di 20 (CLRB no. 1210), page 37; application for judicial review filed on November 21, 1997; emphasis added)

More specifically, the Board approaches this issue by closely examining the true nature of the work carried out by the employee in question. The Board does not dwell on the incidental duties of the position, but rather focuses special attention on the core functions of the position. In Ontario Hydro, supra, the Board stated the following in this regard:

"... While the Board's determination will ultimately identify the employees who are to perform the functions covered by a collective agreement, the determination to be made is as to the true nature of the work. It is made without reference to the title or identity of the persons employed in the performance of the job at issue, but having regard instead to the characteristics of the function.

Where an employer assigns work which is on the borderline of union jurisdiction, and the assigned work does not clearly fall in one unit or the other, in order to make a determination, the Board must endeavour to separate, in light of the intended scope of the recognition clause or certification certificate, the core functions of a position from its secondary characteristics (Cape Breton Development Corporation (1986), 67 di 203 (CLRB no. 595)). The Board will not readily divide the position up between bargaining agents. The Code does not contemplate that an employee may be

split between bargaining units and, therefore, the Board will not further break down its analysis of the work being performed. ..."

(pages 40-41)

The decision rendered in Société Radio-Canada, February 5, 1990 (LD 778), provides a clear illustration of this principle in the context of a jurisdictional dispute over the administrative restructuring of a position. Another such illustration is provided by Montreal Port Corporation, supra. What was at issue in Société Radio-Canada was a transfer of the job classification of captioner, who had been part of the newsroom staff and had been covered by the reporter union's certification, to the new hearing-impaired unit covered by CUPE's certification. The Board considered the nature of the job and how it had developed over the years, and made the following findings:

"When the Corporation created the captioner job classification, the captioners were part of the newsroom staff and worked under the newsroom supervisor. The job description of those employees was subsequently included in the SJRC's agreement and the classification was recognized by the parties as included in the bargaining unit. At that time, the captioners' work involved only the captioning of the newscast 'Le Téléjournal.' It is reasonable to conclude that this led the parties to include them in the SJRC's bargaining unit. The situation remained the same until April 1989.

As of that date, the situation changed. A hearing-impaired unit was set up. The employees were transferred to and incorporated into that separate unit. The captioners' duties and responsibilities changed. Thereafter, they were responsible for preparing texts for the closed captioning of 'Le Téléjournal,' a responsibility that had been part of their job description under the SJRC's agreement, but they also had to do captioning for all types of programs produced not by the news department but by the general interest television. This was not disputed by the applicant. ...

In these circumstances, each of these employees must be versatile and must do captioning work for both 'Le Téléjournal' and other programs, such as 'La Messe' or 'La Semaine Verte.' Clearly, the Board cannot logically conclude that the captioners are governed by the SJRC's collective agreement when they have to do captioning work for newscasts and by the agreement of CUPE (office workers group) when they have to prepare texts for other programs as part of their work. A decision by the Board to that effect would be

inapplicable and lead to nothing but chaos. It would prevent the employer from functioning efficiently and result in inter-union conflicts of interest and numerous grievances being filed with the Corporation by both the SJRC and CUPE (office workers group)."

(pages 5-6; translation; emphasis added)

Because of the changes to the nature of the work, the Board concluded that the captioners had to be included in CUPE's bargaining unit. In the circumstances of that case, coherence in labour relations and administrative efficiency were the determining factors in the Board's decision. In fact, it would have been inconceivable, according to the Board, for the employees to belong to two bargaining units depending on the programs for which they were doing captioning work.

Based on the specific circumstances of the case, which convinced us that the changes were legitimate, we believe that the principles set out above apply to the instant case even though two different employers are involved here because of the existence of two certifications, as will now be discussed.

V. DECISION

In light of these principles, we now turn to the nature of the work in question in order to determine whether it is covered by CUPE's or the CNTU's certification.

Before deciding that question, it is not sufficient to know whether operating the winch in the cab of the marine tower constitutes longshoring within the meaning of section 34 of the Code (see Halifax Grain Elevator Limited (1989), 76 di 157 (CLRB no. 725); Re Eastern Canada Stevedoring Company Ltd., [1955] S.C.R. 529; Cargill Grain Company Limited, Gagnon and Boucher Division v. International Longshoremen's Association, Local 1739, et al. (1983), 51 N.R. 182 (F.C.A.)), since, exceptionally, both of the certificates at issue include longshoring operations, each in its own area of activity.

That is what the Board found in Les Élévateurs des Trois-Rivières (division de ULS Corporation) et autres, December 6, 1991 (LD 964), based on the parties' admissions. The Board clearly ruled that the CNTU's certification covering the employees of Les Élévateurs des Trois-Rivières is an exception to CUPE's geographic certification. Although that case was ultimately discontinued, the Board thought it appropriate to make some comments in this regard for future reference. It noted that the employer, Les Élévateurs des Trois-Rivières, is involved in longshoring in the grain, alumina and coke industries and that the certification covering its employees is an exception to CUPE's geographic certification for the rest of the longshoring operations at the

port of Trois-Rivières/Bécancour. It characterized the operations of Les Élévateurs des Trois-Rivières and CNTU's certification as follows:

"... These admissions to some extent confirm the evidence, which showed that ULS [Les Élévateurs des Trois-Rivières] is the only employer involved in operating elevators in Trois-Rivières and that its grain, alumina and coke operations are in fact clearly a single, integrated operation, inter alia because of the shared use of the marine tower, and have historically been provided with a permanent staff.

...

... All of this will help in recalling the universal and general nature of the regional certification held by CUPE and the MEA at the ports of Trois-Rivières and Bécancour. It will also bring to mind the specific or exceptional nature of the unit represented by the CNTU at ULS, an establishment that has historically been recognized as separate and has been kept separate by the uniqueness of an operation that may be diversified but that continues to have the distinctive feature of being integrated into an indivisible whole separate from the rest."

(pages 7-8; translation)

This statement confirms the indivisible and exceptional nature of the certification certificate held by CNTU for all operations of Les Élévateurs des Trois-Rivières, including longshoring operations.

Accordingly, the fact that operating the winch constitutes longshoring does not prevent it from being covered by the CNTU's certification order if that operation is part of the intended scope of that certification. For this reason, the fact that the winch operator position was included in the longshoremen's job classifications in article 19 of the collective agreement between the MEA and CUPE is not determinative. Since both certificates encompass longshoring operations, the inclusion of the winch operator position in CUPE's agreement does not preclude that longshoring work from being done by a member of the CNTU if this work is part of the indivisible whole of the scope of the CNTU's certificate.

The parties admitted that the only change made to the operation of the winch in 1993 was the relocation of the control box to the cab of the marine tower. The winch, which used to be operated from the deck of the ship, is now operated from the cab of the marine tower as a result of the lengthening of the winch's electrical wire. That

change was made for safety reasons, so that the operator could see more clearly when operating the winch. In this regard, the employer's choice seems to us to be legitimate.

The relocation of the control box to the cab of the marine tower led the employer to make the marine tower operator responsible for operating the winch. That operator was therefore made responsible for pushing the button on the control box that is used to operate the winch to take hold of power-operated equipment on the wharf and lower it into the hold of the ship. That is what is in dispute.

The winch is operated mainly while the unloading is being completed. It is not operated regularly or continuously. On the contrary, it is clear from the file that operating the winch is not a full-time job and therefore does not require an employee to be assigned solely to this operation. It is mainly for this reason that the employer decided to assign the work to the CNTU employee already on duty in the cab of the marine tower.

Relocating the winch control box has not fundamentally amended the duties of the longshoremen on the wharf or the marine tower operator. The longshoremen continue to be assigned to longshoring work on the wharf, and no other employee has been assigned to operate the winch control box that is now in the cab of the marine tower.

In fact, the core duties of the longshoremen and the marine tower operator were not amended. Prior to 1993, operating the winch was only an incidental part of the longshoremen's work, and similarly, since the change in 1993, operating the winch is only an incidental part of the marine tower operator's work. This consideration is determinative in this case.

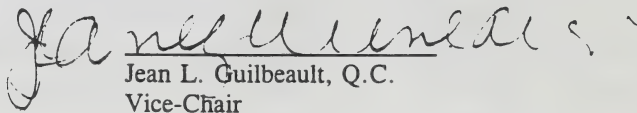
It has been found in previous decisions dealing with section 65 of the Code that the Board must draw a distinction between the core and secondary functions of a position. (See Ontario Hydro, *supra*, at pages 40-41.) In this case, it is clear that the core functions of the marine tower operator were not amended by adding the operation of the winch. The core duties remained the same, and it is difficult to see how it could be concluded that the addition of the incidental work of operating the winch means that the operator is covered by CUPE's certification, despite the fact that his core functions as the marine tower operator were not amended, or by two certification certificates depending on the work he is doing. That employee was responsible for operating the marine tower of Les Élévateurs des Trois-Rivières before the change in 1993, and his core function continues to be operating the marine tower, despite the fact that the winch control box has been relocated to the cab of the marine tower. To reach any other conclusion would result in a needless division of the scope of the CNTU's certificate and in an anomaly that would be difficult to administer from a labour relations standpoint. Moreover, a different conclusion would go against the indivisible and unique nature of the CNTU's certification certificate, which includes

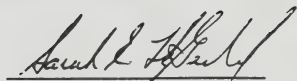
longshoring in relation to grain, alumina and coke (Les Élévateurs des Trois-Rivières (division de ULS Corporation) et autres, supra).

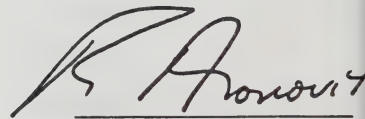
Finally, a different conclusion would disrupt industrial peace, since it would necessarily involve assigning a longshoreman represented by CUPE to operate the winch in the cab of the marine tower. The certificates at issue must not be so dissected that their limits are defined on the basis of incidental duties assigned to a position already clearly covered by one of the certificates. The Board concludes that the incidental operation of the winch from the cab of the marine tower is part of the indivisible whole of the intended scope of the CNTU's certificate.

VI. CONCLUSION

For all these reasons, the Board finds that the operation of the winch, as relocated to the cab of the marine tower, is covered by the CNTU's certification certificate.


Jean L. Guilbeault, Q.C.
Vice-Chair


Sarah E. FitzGerald
Member


Roza Aronovitch
Member

information

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Summary

Marinus Van Uden, *complainant*, Canadian Union of Postal Workers, *respondent*, and Canada Post Corporation, *employer*.

Board File: 17969-C
CLRB/CCRT Decision no. 1223
April 22, 1998

This case deals with a complaint of an unfair labour practice. The complainant alleged that the Canadian Union of Postal Workers violated the duty of fair representation set out in section 37 of the Code.

The complainant argued that the union conducted itself in an arbitrary manner when it agreed to changes in employee vacation bid practice, without consulting the affected employees. If changes in bid practice are being considered, the collective agreement mandates a process of consultation. The complainant claimed that the process requires the union to consult directly with employees. The union submitted that this is not required, and that instead, the process is intended to be one of consultation between employer and union representatives.

The Board concluded that the union did not conduct itself in an arbitrary manner. At issue is a difference of opinion between a member of the bargaining unit and the union, concerning the precise meaning of an article of the collective agreement. Such differences of opinion are not in and of themselves, a

Résumé

Marinus Van Uden, *plaignant*, Syndicat des travailleurs et des travailleuses des postes, *intimé*, et Société canadienne des postes, *employeur*.

Dossier du Conseil: 17969-C
CLRB/CCRT Décision n° 1223
le 22 avril 1998

Il s'agit en l'espèce d'une plainte de pratique déloyale de travail dans laquelle le plaignant allègue que le Syndicat des travailleurs et des travailleuses des postes a manqué au devoir de représentation juste prévu à l'article 37 du Code.

Le plaignant soutient que le syndicat a agi de manière arbitraire en consentant à ce que des changements soient apportés à la mise au choix des congés annuels sans consulter les employés touchés. La convention collective prévoit un processus de consultation lorsqu'il est question d'apporter des changements à la mise au choix. Le plaignant affirme que le syndicat doit consulter les employés directement. Le syndicat maintient que cela n'est pas obligatoire et qu'il est plutôt question de processus de consultation entre l'employeur et les représentants du syndicat.

Le Conseil conclut que le syndicat n'a pas agi de façon arbitraire. Le litige se résume à une divergence d'opinions entre un membre de l'unité de négociation et le syndicat quant au sens précis d'un article de la convention collective. Une telle divergence d'opinions ne peut servir de fondement pour conclure à la

basis to find a violation of section 37 of the Code. Interpretation of collective agreements is the responsibility of the parties that negotiate them, as long as that task is not performed in an arbitrary or discriminatory manner, or in bad faith. The Board finds no reason to question the union's interpretation that direct consultation with the employees is not required.

violation de l'article 37 du Code. L'interprétation des conventions collectives incombe aux parties qui les négocient, tant que cela ne se fait pas d'une façon arbitraire ou discriminatoire ou de mauvaise foi. Le Conseil ne voit donc aucune raison de mettre en doute l'interprétation du syndicat selon laquelle la consultation directe des employés n'est pas obligatoire.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Marinus Van Uden,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation

employer.

Board File: 17969-C (745-5632)
CLRB/CCRT Decision no. 1223
April 22, 1998

The Board was composed of Mr. J. Philippe Morneau, Vice-Chair, as well as Ms. Véronique L. Marleau and Ms. Sarah E. FitzGerald, Members. A hearing was held on October 15, 1997, at Winnipeg.

Appearances

Mr. Marinus Van Uden, on his own behalf;
Mr. Gordon Fischer, Grievance Officer, Prairie Region, assisted by Mr. George Floresco, President, Winnipeg Local, for the respondent; and Mr. Zygmunt Machelak, Legal Affairs, Western Canada, assisted by Mr. G.M. (Gord) Arseny, Labour Relations Officer, Mail Operations, for the employer.

These reasons for decision were written by Ms. Sarah E. FitzGerald, Member.

I - Introduction

The complainant, Mr. M. Van Uden, is a full-time, Group 2 letter carrier employed by Canada Post Corporation (the "Employer") at Station Q in Winnipeg. Group 2 consists of full-time and part-time letter carriers and mail service couriers. Mr. Van Uden alleges that his trade union, the Canadian Union of Postal Workers ("CUPW" or the "Union"), violated the duty of fair representation set out in section 37 of the Canada Labour Code (Part I - Industrial Relations):

"37. A trade union or representative of a trade union that is bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Specifically, he claims that CUPW acted in an arbitrary manner when it agreed to a change in the vacation scheduling process for Group 2 members. This annual process is conducted in "rounds" or "bids". In each round, employees are given an opportunity, in descending order of seniority, to schedule weeks of their vacation entitlement.

The complainant discovered the change in process while bidding on the April 1997 - March 1998 vacation leave schedule. In the first round of bidding Mr. Van Uden found as usual, that employees were permitted to schedule up to a certain maximum number of weeks of their overall entitlement. In the second round however, Mr. Van Uden discovered that he was not permitted to schedule all remaining weeks of his entitlement, as had been the practice at Station Q for several years. An Employer representative informed him that CUPW and the Employer had agreed that the bidding process that year would no longer be restricted to two rounds. At Mr. Van Uden's Station, there would be a third round, and he would have to wait until then to book his final week of entitlement.

Mr. Van Uden and a number of employees from Stations Q and K (collectively known as the "Moray Street" Station) immediately signed and forwarded a petition to Mr. George Floresco, President of the CUPW Winnipeg Local. The petition requested that employees be permitted to schedule all remaining vacation entitlement in the second round of bidding, and that CUPW adhere to Article 19.16(d) of the collective agreement which states:

"19.16(d) An employee who wishes to split his or her vacation entitlement will be permitted, by seniority, to bid only on one (1) portion of his or her proposed split in the first round of bidding. After all other employees in the post office or work area, whichever is applicable, have bid, he or she will be given the opportunity to use his or her seniority to bid on whatever blocks or portions of blocks are left vacant."

Mr. Van Uden and his fellow petitioners interpret Article 19.16(d) as limiting the annual vacation bidding process to two rounds only.

When Local President Floresco did not promptly respond to the petition, Mr. Van Uden filed his complaint with this Board. He alleges that CUPW acted in an arbitrary manner, contrary to section 37 of the Code: 1) in not giving any reasons for the change in the bidding process, and 2) in not satisfying the Article 19.16(c) requirement for "local consultation" if a change in the bidding practice was to be made:

"19.16(c) The bidding for leave will be by work area or by office. Any change with regard to the present practice of bidding in any post office by work area or by office, shall be subject to local consultation."

(emphasis added)

Mr. Van Uden maintains that "local consultation" requires that CUPW consult with the Group 2 letter carriers. In his view, the subject of a change in bid practice should have been raised, upon proper notice to letter carriers, at a trade union meeting held well in advance of the start of vacation bidding. To support this claim, he cites various provisions of the CUPW Constitution which emphasize the role of the members in directing the activities of their trade union.

Two weeks after Mr. Van Uden filed his complaint with this Board, Local President Floresco issued a notice dated March 21, 1997, entitled "Vacation Leave Schedules". In it, he discussed some of the vacation scheduling problems CUPW had encountered in respect of the annual vacation scheduling process for Group 1 and Group 2. Concerning Group 2, he stated:

"... Unfortunately, as in a few other areas of the collective agreement, there was a notable lack of consistency in the method of scheduling and bidding among depots. Some areas had 3, 4 or 5 bids while others had only 2 bids. For the past few years the Local has attempted to correct this problem. However, it seems that not all depots got the message until this year. Maintaining the expanded rounds of bidding respects seniority rights for all members, considering the nature of the schedule.

This year, however, management created another problem by bidding schedules by 'installation' rather than depot. This has created a monster. As of the writing of this bulletin bidding has not been completed at Raleigh. Schedules were to be completed by the 2nd week in February. The Local was opposed to this new system and warned management there would be problems. The issue has been grieved and hopefully next year saner heads will prevail."

Despite this notice, Mr. Van Uden continued to pursue the matter of his complaint to the Board. In responding to the complaint, CUPW took the position that the Article 19.16(c) reference to "local consultation" meant consultation between Employer and Union representatives.

The full scope of CUPW's position only emerged at the Board's public hearing into the matter.

II - Facts

To understand the subject matter of this dispute, it is of assistance to review the changes that were made in the vacation bid practice. The testimony of Winnipeg Local President George Floresco, Group 2 Chief Steward Bob Tyre, and the complainant Mr. Van Uden satisfies the Board of the following matters.

Employer and Union representatives consulted on the subject of vacation bid practice in the autumn of both 1995 and 1996. Local President Floresco and Chief Steward Tyre participated in both consultations.

During the 1995 consultation, CUPW and the Employer agreed to return to the system of multiple bidding rounds that had been in place years ago. On November 29, 1995, management issued a memo to "All Letter Carriers" concerning "Vacation Bidding". The memo stated:

"MANAGEMENT AND C.U.P.W. HAVE AGREED AT CONSULTATION, ARTICLE 19.16 d DOES NOT LIMIT THE ROUNDS OF VACATION BIDDING TO 2 ..."

CUPW was in favour of the change, due to its concern about inconsistencies in the bidding process within the Winnipeg Local. The two-round system appeared unfair to employees with mid-range seniority, given the number of remaining weeks of vacation entitlement that more senior employees still held at the second round. Many employees with mid-range seniority would be denied an opportunity to schedule any amount of vacation in the time periods associated with Christmas, March school break for children, and statutory holidays. There were also concerns about the

trading/selling of vacation weeks between employees and the need for a consistent application of the wording of the collective agreement within the Local.

Following the autumn 1995 consultation, CUPW believed that the upcoming bid on the April 1996 - March 1997 vacation schedule would no longer be limited to two rounds. In fact, as CUPW noted two months after that consultation, in responding to the concerns of a Group 2 employee who wished to grieve the change to the multiple round process:

"You are right when you say that there has been a change in the procedure in your depot. It is not often that I can say that the employer has met its obligations but in this case they have. Clause 19.16(c) indicates that any change must be consulted on. We did have consultation with them on this, so there is no violation for you to file the grievance for.

The local has been trying to settle the issue for a couple of years. The practice of multiple rounds was the norm in most locations (but not all). The change to two rounds in all depots was implemented by management without consultation when we obtained 5 weeks holidays after 14 years, because extra rounds meant extra work for them...

Management took advantage of the ambiguous language in 19.16(d). However, there is much more to consider than just one clause: past practice (which was multiple rounds until the employer made unilateral changes), article 19 as a whole, which has references in other clauses that the union believes indicates multiple rounds are required, the negative effect on those in the middle seniority range, what the bidding procedure is in other locations in Winnipeg, (for instance, internally, where the language is exactly the same, they have always held multiple rounds, and the MSC held multiple rounds well after some of the depots stopped), what the practice is in other locations in Canada, etc.

In order to file a grievance, there would have to be a violation by management. At the consultation, management told us that they would have only two rounds. The local informed them we thought that two rounds is a violation and asked them to check with Labour Relations and Ottawa. They did and got back to us stating that our

interpretation was indeed correct and they would hold as many rounds as necessary.

I hope this answers your questions. I don't expect all members to be happy with the system as there will be cases where someone is not as well off with their bid under this system. However, it is a reflection of the language in the collective agreement, as ambiguous as it is, and it allows us to have a National application of the collective agreement, which is actually very important in the overall picture."

Months later, CUPW discovered that some depots had not applied the multiple-round process. For example, Stations Q and K (the Moray Street Station at which Mr. Van Uden works) had continued with a bid process limited to two rounds.

CUPW revisited the issue during its 1996 consultation with the Employer. Once again the Employer and Union agreed, this time in respect of the upcoming bid for the April 1997 - March 1998 vacation schedule, that bidding would not be restricted to two rounds. During this consultation, the Employer also confirmed that the upcoming vacation bid would be conducted by "installation" within the Winnipeg Local, rather than the usual process by "office" or "depot". The Moray Street Station, consisting of both Stations Q and K, is considered an "installation" for purposes of the collective agreement.

It was therefore, during the ensuing "multiple round" bid, by "installation", for the 1997-98 vacation schedule, that Mr. Van Uden first experienced the changes in bid practice.

III - Analysis

At issue in this case, is a difference of opinion between a member of the bargaining unit and the Union, concerning the precise meaning of an article of the collective

agreement. The Board has explained in its decisions, on many occasions, that such differences of opinion are not in and of themselves a basis to find violations of the duty of fair representation. Interpretation of collective agreements is the responsibility of the parties that negotiated them as long as that task is not performed in an arbitrary or discriminatory manner, or in bad faith. See Gino Giammarino (1993), 93 di 145 (CLRB no. 1047); D.M. Hlady and J.N. Harris (1993), 93 di 8 (CLRB no. 1034); and Ken Silver et al. (1991), 85 di 145 (CLRB no. 877).

Even though Mr. Van Uden feels the letter carrier membership should have been consulted by way of a trade union meeting and referendum vote, the Board finds no reason to question the Union's interpretation that the collective agreement does not require this. The principle of consultation between Employer and Union and the various levels at which it might be conducted (for example, national and local) are described in Article 8 of the collective agreement. Moreover, the contrasting wording of subsection (e) of Article 19.16 supports the Union's position that Article 19.16(c) does not require specific consultation with the members. Article 19.16(e) specifically mentions decisions that may be "approved and ratified by the local members of each individual local".

We accept therefore, based on the evidence provided to us, the Union's claim that "local consultation" within the meaning of Article 19.16(c) occurred in both 1995 and 1996, with respect to changes in bid practice that affected Mr. Van Uden.

As to the actual changes in bidding practice, the Board is of the view that CUPW seriously considered the matter and concluded it was in the long-term interest of the members of the Winnipeg Local and the Union as a national bargaining representative,

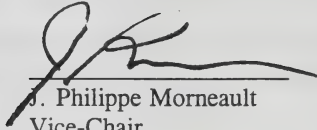
that a consistent approach to vacation scheduling be applied to the Group 2 membership in Winnipeg. It was certainly within CUPW's right to adopt this position. CUPW's conduct satisfies the principles of the duty of fair representation expressed in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, page 527; and Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057, [1990] 1 S.C.R. 1298. As the Supreme Court of Canada stated in Gendron, *supra*:

"The principles ... [of the duty of fair representation] ... clearly contemplate a balancing process ... a union must in certain circumstances choose between conflicting interests in order to resolve a dispute ... In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by ... [improper motives] ... and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable."


(pages 1328-29)

In the matter before us, CUPW acted through its elected officers and executive members and we find no evidence of improper motive. The fact that the CUPW Constitution reflects the importance of members in directing the activities of the trade union does not mean that membership can, should, or reasonably could be consulted on every decision that the Union must take in fulfilling its role as the representative of the employees in the bargaining unit. In the event Mr. Van Uden is dissatisfied with decisions of elected representatives, there are internal democratic processes in place through which he can seek to effect change. Such differences are not however, appropriate subject matter for section 37 complaints to this Board. Had the Union's submission in reply to the complaint shown the full scope of its position, we are of the opinion that a public hearing would not have been warranted.

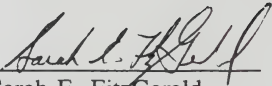
For the foregoing reasons, the complaint is dismissed.



J. Philippe Morneau
Vice-Chair



Véronique L. Marleau
Member



Sarah E. FitzGerald
Member

information

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Summary

Mark Hollingsworth, *complainant*, and Canadian Union of Postal Worker, *respondent*.

Board File: 16891-C (745-5173)
CLRB/CCRT Decision no. 1224
April 24, 1998

These reasons deal with a complaint alleging violation of section 95(f) of the Code by the Canadian Union of Postal Workers (CUPW).

In March 1995, the Complainant was on union leave, working as a full-time executive of the Toronto Local of CUPW. He accepted a transfer in a location outside the jurisdiction of the Toronto Local but asked that it be deferred for an extended period of time. When CUPW became aware of this, it considered him to have become a member of the Hamilton Local based on his acceptance of a position in Dundas, Ontario. However, the Complainant subsequently rescinded his transfer and resumed instead his letter carrier activities at Station "D" in Etobicoke in May 1995, with the Employer's consent. CUPW refused to review its position and,

Résumé

Mark Hollingsworth, *plaignant*, et Syndicat des travailleurs et travailleuses des postes, *intimé*.

Dossier du Conseil: 16891-C (745-5173)
CLRB/CCRT Décision n° 1224
le 24 avril 1998

Les présents motifs concernent une plainte alléguant que le Syndicat des travailleurs et travailleuses des postes (STTP) a violé l'alinéa 95f) du Code.

En mars 1995, le plaignant était en congé pour fonctions syndicales, étant dirigeant syndical à plein temps à la section locale de Toronto du STTP. Il a accepté une mutation à un endroit situé hors du territoire relevant de la section locale de Toronto, mais il a demandé que la mutation soit différée pour une période prolongée. Lorsque le STTP a appris la chose, il a considéré le plaignant comme membre de la section locale de Hamilton en raison de son acceptation d'un poste à Dundas (Ontario). Toutefois, le plaignant a par la suite fait annuler sa mutation et a plutôt repris ses activités de facteur à la succursale «D» à Etobicoke en mai 1995, avec le consentement de l'employeur. Le

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as a result, the Complainant who, to date, continues to work in his original position in Etobicoke, has been unable to exercise his membership rights at the Toronto Local since that time.

The Board rejected CUPW's preliminary objection that the Board refuse to deal with the complaint pursuant to section 97(4) of the Code because the Complainant had not attempted to avail himself of the appeal procedures available under the National Constitution. The Board determined that the Complainant did not have ready access to the Union's internal avenues of appeal and that, in any event, the question of denial of access to internal recourses was central to the Complainant's claim that he was treated in a discriminatory fashion.

The Board allowed the complaint in part. It determined that, although the Complainant could not avoid the consequences of his accepting a transfer on his ability to remain an executive officer of the Toronto Local, he could not be unjustifiably deprived of his membership rights at the Toronto Local after his transfer was formally cancelled. At all relevant times, the Complainant's place of work was not Dundas but Etobicoke.

STTP a refusé de revoir sa position; par conséquent, le plaignant, qui occupait toujours son poste initial à Etobicoke, n'a pu exercer ses droits d'adhésion à la section locale de Toronto depuis cette date.

Le Conseil a rejeté l'objection préliminaire du STTP selon laquelle le Conseil devait refuser d'instruire la plainte aux termes du paragraphe 97(4) du Code parce que le plaignant n'avait pas tenté de recourir à la procédure d'appel que lui offrent les Statuts du syndicat. Le Conseil a établi que le plaignant n'avait pas facilement accès aux voies d'appel internes du syndicat et que, quoiqu'il en soit, le refus d'accès aux recours internes était au coeur de l'allégation du plaignant selon laquelle il avait été traité de façon discriminatoire.

Le Conseil a accueilli la plainte en partie. Il a jugé que, même si le plaignant ne pouvait éviter les conséquences de son acceptation d'une mutation sur sa capacité de demeurer dirigeant à la section locale de Toronto, ce dernier ne pouvait être privé sans justification de ses droits d'adhésion à la section locale après que sa mutation eut été officiellement annulée. À toute époque pertinente, le lieu de travail du plaignant était non pas Dundas, mais Etobicoke.

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Accordingly, the Board found that CUPW had violated section 95(f) of the Code by preventing the Complainant from exercising his membership rights at the Toronto Local from the time it became aware that he had returned to his original position in Etobicoke with the Employer's consent.

CUPW requested that the Board refuse to provide any relief to the Complainant because he had not come to the Board with "clean hands". Although the Board agreed that it has the discretion to apply the principles of the "clean hands" doctrine and refuse to make any order in respect of a violation of a section of the Code where it believes that it is just and equitable to do so in view of the improper conduct of the complainant, the Board found that this was not a case where this doctrine applied.

Since the Board determined that the membership rights relied on and which it was asked to protect had been unjustifiably and unlawfully denied, it ordered that CUPW allow forthwith the Complainant to exercise his membership rights at the Toronto Local.

Par conséquent, le Conseil a conclu que le STTP avait violé l'alinéa 95f) du Code en empêchant le plaignant d'exercer ses droits d'adhésion à la section locale de Toronto à partir du moment où il a appris que le plaignant avait repris son poste initial à Etobicoke avec le consentement de l'employeur.

Le STTP a demandé que le Conseil refuse d'accorder un redressement au plaignant parce que ce dernier ne s'était pas présenté devant le Conseil avec «des mains propres». Même si le Conseil a convenu qu'il a le pouvoir discrétionnaire d'appliquer les principes de la doctrine «des mains propres» et de refuser de rendre une ordonnance dans le cas d'une violation d'un article du Code, lorsqu'il croit qu'il est juste et équitable de le faire en raison de la conduite improprie du plaignant, il a jugé qu'il ne s'agissait pas d'une affaire où cette doctrine s'appliquait.

Comme le Conseil a décidé que les droits d'adhésion qui étaient invoqués et qu'on l'invitait à protéger avaient sans justification été illégalement refusés, il a ordonné que le STTP permette sur-le-champ au plaignant d'exercer ses droits d'adhésion à la section locale de Toronto.

Reasons for decision

Mark Hollingsworth,

complainant,

and

Canadian Union of Postal Workers,

respondent.

Board File: 16891-C (745-5173)
CLRB/CCRT Decision no. 1224
April 24, 1998

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members. A hearing was held on November 6, 7 and 8, 1996, March 24 and 25, and May 27, 28 and 29, 1997 in Toronto, on December 4, 1997 in Ottawa, and on December 8, 10 and 12 in Toronto, Ontario.

Appearances

Mr. Harry Kopyto, accompanied by Mr. Mark Hollingsworth, for the complainant;
and

Mr. David I. Bloom, accompanied by Mr. André Kolompar, for the respondent.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

I

BACKGROUND

These reasons deal with a complaint filed by Mr. Mark Hollingsworth (the Complainant) on August 15, 1995, pursuant to section 97 of the Canada Labour Code. The Complainant, an employee of the Canada Post Corporation (Canada Post or the Employer), alleges that the Canadian Union of Postal Workers (CUPW or the Union) violated section 95(f) of the Code by unlawfully denying him his membership rights in the Toronto Local and removing him from his position as 4th Vice-President of the Toronto Local in May 1995.

The section of the Code alleged to have been breached by CUPW provides:

"95. No trade union or person acting on behalf of a trade union shall

...

f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union; ..."

The events that led to this complaint are essentially as follows. In March 1995, the Complainant was on union leave, working as a full-time executive of the Toronto Local. He applied for transfer to a letter carrier position in a location outside the jurisdiction of the Toronto Local. He was awarded the position but asked that his reporting be deferred for an extended period. When CUPW became aware of this, it considered him to have become a member of the Hamilton Local based on his acceptance of a position in Dundas, Ontario. However, the Complainant subsequently rescinded his transfer and resumed instead his letter carrier activities at Station "D" in Etobicoke in May 1995, with the Employer's consent. The Union refused to review its position and, as a result, the Complainant who, to date, continues to work in

Etobicoke has been unable to exercise his membership rights at the Toronto Local since that time.

The Union denies that it has applied its membership rules to the Complainant in a discriminatory manner. Its position is that by having voluntarily accepted a lateral transfer from his position at Station "D" in Etobicoke to a position in Dundas, the Complainant became a member of the Hamilton Local and ceased to be a member of the Toronto Local. As a result, he lost his right of membership in the Toronto Local and gave up his right to hold office there pursuant to article 1.17 of CUPW's National Constitution, which stipulates:

"1.17 When a member in good standing is transferred from one Local to another, all his/her rights are maintained and he/she does not have to be admitted or readmitted as a member in good standing. He/She shall however resign from any position in which he/she was elected or appointed by the members of the Local he/she is leaving."

The Union presented a preliminary objection pursuant to section 97(4) of the Code asking that the Board dismiss the complaint on the grounds that the Complainant had not availed himself of the internal union remedies available before filing the instant complaint. The Board reserved its decision on that question pending completion of the proceedings.

On December 19, 1997, the Board issued its decision on the present complaint, allowing it in part. It advised the parties by letter (LD 1767) that it had determined: (1) that CUPW had not violated section 95(f) of the Code by concluding that Mr. Hollingsworth had voluntarily accepted a position in the Dundas Post Office and had thus given up his right to hold office in the Toronto Local pursuant to article 1.17 of the National Constitution; and (2) that CUPW had however violated section 95(f) of the Code by preventing the Complainant from exercising his membership rights at the Toronto Local when it had become aware that he had returned to his position at Station "D" in Etobicoke and had remained there with the Employer's consent.

Accordingly, the Board declared that the Union had not breached section 95(f) of the Code with respect to the Complainant's removal from his position as 4th Vice-President of the Toronto Local, but had violated that section with respect to the Complainant's entitlement to exercise his membership rights in the local having jurisdiction over his place of work. Having so found, the Board ordered: (1) that the Union rescind forthwith its decision not to allow Mr. Hollingsworth to exercise his membership rights at the Toronto Local; and (2) that the Union pay the legal fees and reasonable expenses incurred by the Complainant with respect to the preparation and hearing of the instant complaint. At that time, the Board indicated that detailed reasons for its decision would follow. These reasons confirm and expand on the Board's decision.

II

THE FACTS

Mr. Hollingsworth started to work for Canada Post in January 1987 as a letter carrier, at Station "D" in Etobicoke. Before the merger of bargaining units covering operational employees in 1989, he was a member of the Letter Carriers Union of Canada (LCUC) and he held the position of Secretary-Treasurer of LCUC's Local 105. After the merger, Mr. Hollingsworth became a member of CUPW, which had become the certified bargaining agent for the consolidated bargaining unit of Canada Post employees now including both external (letter carriers) and internal (postal workers employees) groups, following a vote involving LCUC and CUPW.

In 1994, Mr. Hollingsworth ran for the office of 4th Vice-President of the CUPW Toronto Local on the same slate as Mr. Tom Gill. Mr. Gill was running for the office of President of the Local against Mr. André Kolompar, the Local's former President. Both Messrs. Hollingsworth and Gill were elected following two rounds of balloting on October 19, 1994. As the 4th Vice-President position is a full-time union position (the employee's salary is paid by CUPW), Mr. Hollingsworth took union leave from his letter carrier position at Etobicoke's Station "D".

Shortly after the election, a raid aimed at displacing CUPW as the certified bargaining agent was conducted by what was known as the "powerbase", an internal faction composed of LCUC supporters. On October 24, 1994, to discourage any of the members from participating in this raid, Mr. Robert Borch, National Director of CUPW for the Metro-Toronto Region, sent all Toronto Local officers, including the Complainant, a letter requesting that they sign a denunciation of any attempt by any group to raid CUPW's membership. Mr. Hollingsworth refused to sign the letter considering it as an affront to him and the members he was representing.

Prior to being elected, the Complainant who lives in Dundas, Ontario, had requested a transfer to Hamilton or Dundas to be closer to his home. In early March 1995, he received a form letter from Canada Post advising him that he was eligible for transfer to a full-time letter carrier position in Dundas. The letter indicated that the position would go to the most senior employee on the transfer list. The Complainant had to complete the form by indicating his acceptance or rejection of the position and return it to Canada Post by Tuesday, March 7, 1995. This would enable the Employer to staff the position based on a finalized list of eligible candidates, by awarding it to the most senior employee on that list. The Complainant signed the form and returned it to Canada Post accepting the proposal.

Another employee, Mr. Leonard Laufman from Oakville, received the same letter from the Employer. Mr. Laufman also signed the form and returned it to Canada Post accepting the transfer.

On March 8, 1995, Mr. Hollingsworth called Mr. Sunny Mathew, the Canada Post officer responsible for staffing the Dundas position, to enquire about his standing in the staffing process. Upon learning that Mr. Laufman was the senior applicant, Mr. Hollingsworth argued that that he, rather than Mr. Laufman, should be awarded the position on the basis of universal seniority. Mr. Mathew told the Board that he took his word and awarded him the position. The Complainant was then advised by

letter that he was the successful candidate and should report to the Superintendent of the Dundas Post Office on Monday, March 27, 1995.

As it turned out, Mr. Laufman should have been awarded the position. Mr. Mathew admitted that he had made a mistake in staffing the Dundas position because universal seniority was a new concept that had not yet been applied and there was some confusion as to its proper application. Due to an oversight, the Union was not notified by the Employer of the filling of the vacancy pursuant to article 13.10 of the collective agreement.

On March 17, 1995, Mr. Hollingsworth called Mr. Mathew to tell him that he would not be able to report on March 27, 1995, because he was a member of the union executive and was on union leave for some time. He requested that his reporting date to Dundas be delayed until the end of his union leave on April 2, 1996. He confirmed this to Mr. Mathew in a letter of the same date, requesting further that should he terminate his union leave prior to April 2, 1996, he still be allowed to delay reporting to Dundas Station until April 2, 1996 for personal reasons, in accordance with the collective agreement. Mr. Hollingsworth signed this letter as 4th Vice-President of the Toronto Local and used the CUPW Toronto Local letterhead.

Prior to contacting Mr. Mathew to request a delay in reporting, the Complainant discussed the matter with Mr. Kevin Swait, the Toronto Local's 3rd Vice-President. Mr. Hollingsworth told the Board that he had sought Mr. Swait's guidance because he was a little concerned about the propriety of deferring his transfer until his term of office expired in April 1996. He wanted to make sure that he was on solid ground in accepting the position in Dundas while, at the same time, delaying his transfer for an extended period.

When he received the March 8, 1995 letter from Mr. Mathew notifying him that he was the successful candidate, the Complainant showed it to Mr. Swait and asked if he could properly delay his transfer under the collective agreement, the by-laws of the

Toronto Local and the National Constitution. Mr. Swait told the Board that he had looked at the collective agreement for applicable provisions and suggested to Mr. Hollingsworth that he could do so by "conditionally accepting" the position until he was replaced in his executive position at the Toronto Local. Mr. Swait felt that there would be no violation of the collective agreement since according to his understanding a transfer is not complete until the employee physically reports to the new position, and since in practice deferrals of transfer requests were quite a common occurrence. Accordingly, Mr. Swait told Mr. Hollingsworth that he was entitled to delay his transfer under the collective agreement and could remain an officer of the Toronto Local since he would not be physically leaving his position in Etobicoke.

The Employer did not indicate to the Complainant that he could not delay his transfer. As a result, Mr. Hollingsworth took for granted that everything was fine. He continued to carry on his duties as 4th Vice-president of the Toronto Local. His acceptance of the transfer and his request for a delay in reporting to Dundas remained unknown to the Toronto union officials, with the exception of Mr. Swait, until May 16, 1995.

On May 14, 1995, Mr. Robert Borch, CUPW's National Director for the Metro-Toronto Region, received a telephone call from Ms. Karen Urchak, the President of the Hamilton Local, informing him that Mr. Hollingsworth had accepted a position in Dundas some two months before. She wanted to know when he would be reporting and wondered why he had not yet showed up in view of the fact that some two months had elapsed since his acceptance. She was concerned that in the interim a casual would fill the vacant spot, a situation the Union strives to prevent in order to protect permanent positions. Prior to that telephone conversation, Mr. Borch did not know that Mr. Hollingsworth had requested such a transfer.

A general membership meeting of the Toronto Local was scheduled for the evening of May 16, 1995. Before the meeting, Mr. Borch met with Mr. Gill, the President of the Toronto Local and informed him of what he had learned concerning

Mr. Hollingsworth. He told Mr. Gill that if the Complainant had indeed accepted a position in Dundas some two months before, he would refer the matter to the National President for a ruling. However, he indicated that based on his understanding of the Constitution, if Mr. Hollingsworth had in fact accepted a transfer, he had become a member of the other local and had thereby removed himself from office at the Toronto Local. Mr. Gill told Mr. Borch that he would not be removing the Complainant from office until the issue could be dealt with at the general membership meeting.

Mr. Borch then encountered Mr. Hollingsworth at the Toronto union office. He told the Complainant that he had learned about his acceptance of a transfer to a location in another local's jurisdiction. Mr. Borch was, to say the least, displeased with Mr. Hollingsworth's secrecy. Mr. Hollingsworth confirmed that he had accepted a transfer, but explained that he did not think he had to mention it since he had delayed the transfer and done so for personal reasons. Mr. Borch replied that according to his understanding of the Constitution, once Mr. Hollingsworth had accepted a transfer to another local, he could no longer hold his executive position at the Toronto Local because he could not belong to two locals at the same time. Mr. Hollingsworth agreed, but stressed that, in his opinion, his situation could be accommodated under the collective agreement. He referred to his conversation with Mr. Swait who had indicated that based on his interpretation, this particular situation was not in violation of the collective agreement. Mr. Borch responded that he understood, but that the Complainant was nonetheless no longer in office, adding that he would have to speak with Mr. Tingley about this before the meeting.

Following this, the Complainant went to see Mr. Gill, to inform him of what had transpired from his conversation with Mr. Borch. Mr. Gill told him that the matter would be discussed at the general meeting.

Meanwhile, Mr. Borch called Mr. Darrell Tingley, CUPW's National President, to tell him of his conversation with Messrs. Gill and Hollingsworth and to ask him about the applicable rule in the case of transfers from one local to another. Mr. Borch

mentioned Mr. Hollingsworth's accepting a transfer to Dundas. Mr. Tingley knew that Mr. Hollingsworth was a Toronto Local officer, but did not know which executive position. Mr. Tingley told Mr. Borch that the Constitution was clear. The applicable rule was article 1.17 and this rule meant that once an employee accepted a transfer to a position in another jurisdiction, the employee was then considered to be part of the Local to which he or she had transferred. That employee should therefore report to work in the new location and surrender any position held in the former local. Mr. Tingley was of the view that in Mr. Hollingsworth's case, this meant that by the time he had accepted the transfer to Dundas, he had become a Dundas employee and was therefore no longer a member of the Toronto Local and a union officer of that local.

On the evening of May 16, 1995, Ms. Jane Wynott, the Secretary-Treasurer of the Toronto Local, informed Mr. Hollingsworth that she had been told not to let him sign in to attend the general membership meeting, even though his name appeared on the local's ledger. Mr. Hollingsworth ignored her, went into the meeting room and took his place at the head table.

At the start of the meeting, Mr. André Kolompar, the Regional Grievance Officer for the Metro-Toronto Region, went to the microphone and said that there were "hot and heavy rumours" that Mr. Hollingsworth had accepted a transfer some two months before. He asked, pointing to Mr. Hollingsworth: "How can this officer be a member of Dundas and Toronto at the same time?" He demanded that Mr. Hollingsworth not be admitted in. Mr. Kolompar, who had heard of the Complainant's situation shortly before the meeting, indicated that he shared the view that if Mr. Hollingsworth had accepted a transfer to the Hamilton Local, he could not hold a position on the Toronto Local executive.

At that point, Mr. Hollingsworth addressed the membership to explain that he had delayed his transfer to Dundas for the duration of his term of office. He also pointed

out that there was an outstanding grievance by a more senior candidate, Mr. Laufman, who claimed he should have been granted that position.

Mr. Borch then told the membership that the National President, Mr. Darrell Tingley, had ruled that Mr. Hollingsworth was not a member of this local, could not hold office, and no longer held office pursuant to the National Constitution.

After Messrs. Kolompar and Borch raised the issue of the Complainant's membership status within the Toronto Local and his standing as an officer of that local, Mr. Gill advised the membership that he would investigate the matter. As the crowd was becoming unruly, he decided that the swiftest solution was to ask Mr. Hollingsworth to leave. Mr. Hollingsworth obliged, and Mr. Gill told the membership that this issue would be resolved.

No motion was put forward to the membership with respect to Mr. Hollingsworth's case, and no vote was conducted on that matter at the May 16, 1995 meeting. The minutes of that meeting were originally drafted indicating that the position of 4th Vice-President was vacant. They were subsequently corrected by Mr. Gill who replaced the term "vacant" by the words "present and excused".

The following day, on May 17, 1995, Mr. Hollingsworth wrote to Mr. Mathew of Canada Post at Mr. Gill's suggestion, advising the Employer that he was withdrawing his transfer request to Dundas. However, the Complainant did not send a copy of this letter to Mr. Gill, Mr. Borch or to anyone else at the Union.

Meanwhile, Mr. Borch contacted Mr. Tingley and told him that following the May 16th meeting, he needed a written confirmation of the National President's interpretation of article 1.17 of the National Constitution to clarify Mr. Hollingsworth's status. Two days later, Mr. Tingley sent the requested document indicating his interpretation of the transfer rule. The letter, dated May 19, 1995 and addressed to Mr. Borch, was worded in a generic way. It is this document that

became known as Mr. Tingley's "national ruling" on the interpretation of the transfer rule. The letter reads as follows:

"Re: Membership Status

This letter is further to your telephone call of this date regarding the above-noted subject matter.

Once an employee accepts a transfer, promotion, demotion, etc. to a Post Office outside the jurisdiction of their current Local, they are then considered to be part of the Local covering the jurisdiction of that Post Office. Therefore, said employee should report to work in the new location and surrender any position held within the Local Union.

I trust, this clarifies my position on this matter. "

Mr. Borch asked that the document be handed out to all individuals concerned, including Messrs. Gill and Hollingsworth, and that was done.

Following Mr. Tingley's letter of May 19, 1995, several letters were exchanged between Messrs. Borch, Tingley and Gill, as well as with the Employer. These letters dealt with Mr. Hollingsworth's status and the National President's authority to interpret the by-laws of the Toronto Local and the National Constitution with respect to the transfer issue. Mr. Borch and Mr. Gill were at odds concerning Mr. Hollingsworth's status. Mr. Borch was adamant that Mr. Hollingsworth had transferred out of the Toronto Local to the Hamilton Local by accepting the transfer to Dundas, and that, pursuant to the National President's ruling, he was to be treated as if he had resigned from his executive position at the Toronto Local. On the other hand, Mr. Gill remained firm on his position that Mr. Hollingsworth was still a member and 4th Vice-President of the Toronto Local. Furthermore, in Mr. Gill's view, the determination of this issue was a decision that rested with the Toronto Local, and the National Executive Board (NEB) had no business interfering in local matters.

On May 23, 1995, Mr. Borch, wrote to Mr. Gill advising him that the National President's ruling was in force. As a result, the Complainant was to be removed from the CUPW Toronto Local payroll and should report immediately to Dundas. The National Director also indicated that he felt that the Complainant's withdrawal of his transfer request on May 17, 1995 was nothing more than "playing games with the system". Mr. Borch also wrote to the Canada Post Manager, Labour Relations Central Area, informing him that the Complainant no longer held an executive position in the Toronto Local because he had accepted a transfer to Dundas in March 1995, effective March 27, 1995.

Again on May 23, 1995, the President of the Toronto Local wrote to CUPW's National President to advise him that following his investigation of the matter, he had decided that Mr. Hollingsworth would continue on as the Local's 4th Vice-President. He made it clear that he did not share Mr. Borch's view that the May 19, 1995 letter constituted a "national ruling." He sought Mr. Tingley's guidance because while he intended to stand firm in his decision that the Complainant was still the Local's 4th Vice-President, he was now in an awkward situation as a result of the instructions given by the National Executive to cease remunerating the Complainant. He explained that the "national ruling" placed the Secretary-Treasurer in a very difficult position as she felt that if she did not comply with the order to stop paying the Complainant she could face internal charges. Mr. Tingley replied by telephone and told Mr. Gill that he had to apply the rule he had interpreted (article 1.17 of the National Constitution) locally, and that he should speak to Mr. Borch if he had any problems.

In the meantime, on May 19, 1995, Ms. Wynott, the Toronto Local's Secretary-Treasurer, advised the Complainant that she had been told by Mr. Borch that she would no longer be able to pay him as a full-time officer. At this point, Mr. Hollingsworth decided to go back to work as a letter carrier at his SLC position at Station "D" in Etobicoke, as he could not afford to remain in his position of 4th Vice-President if he were not paid. He made that decision against Mr. Gill's advice. On May 25, 1995, Mr. Hollingsworth resumed his duties at Station "D" in Etobicoke.

The Complainant never did report to Dundas and, to date, continues to work in Etobicoke.

The Employer subsequently confirmed the Complainant's status as a Canada Post employee working at Station "D" in Etobicoke. On May 29, 1995, the Employer sent an internal memorandum to the payroll department confirming that Mr. Hollingsworth had returned to Etobicoke's Station "D" from union leave effective May 25, 1995 and that he would remain there, requesting that the necessary files be transferred back to the Toronto Metro region. Furthermore, on June 16, 1995, the Employer advised Mr. Gill that the Complainant had rescinded his transfer to Dundas because he had declined his transfer offer and confirmed that he still occupied his original position at Etobicoke "D" as a letter carrier. The Complainant's status as an employee at Etobicoke's Station "D" also appeared in the Employee Movement Appointment Information Statement dated June 19, 1995.

Before the NEB meeting of May 30, 1995, Mr. Borch asked Mr. Tingley to circulate his letter of interpretation dated May 19, 1995 along with a letter of May 29, 1995 from Mr. Gill to the NEB members who were all present. In his letter, Mr. Gill was seeking clarification from the NEB on Mr. Hollingsworth's status. Mr. Tingley then proceeded to give a verbal report of the situation, followed by an explanation of his ruling. He asked if anybody had any problem with his interpretation, and nobody did. Mr. Tingley then asked Mr. Borch to reply to Mr. Gill, which he did by letter dated June 13, 1995.

On May 30, 1995, Mr. Borch, acting on behalf of the NEB, gave Ms. Wynott the authorization to advertise the position of 4th Vice-President of the Toronto Local, given the vacancy created by Mr. Hollingsworth's transfer to Dundas. That decision was not challenged by the Toronto Local even though Mr. Gill thought that the NEB had not dealt with the issue.

The Complainant was not made a party to the internal correspondence until late June 1995 when he began to receive copies of the letters that had been circulating since mid-May 1995.

Mr. Hollingsworth was then barred from attending any meeting of the Toronto Local. On August 29, 1995, he was denied access to the general membership meeting of the Toronto Local, notwithstanding the fact that his name appeared on the July membership list where he was described as being on union business.

During that period, Messrs. Borch and Tingley continued to exchange letters with Mr. David Jamieson, Canada Post's Manager, Labour Relations Central Area, concerning Mr. Hollingsworth's status. The Union maintained that, since Mr. Hollingsworth had accepted a transfer to Dundas, he was an employee of the Dundas Station and no longer a member in good standing of the Toronto Local. The thrust of CUPW's position was that there was no place for a deferred transfer and the Complainant should have commenced work in Dundas. Hence Mr. Tingley's letter of June 23, 1995 to Mr. Jamieson, asking that the Complainant be instructed to report to Dundas and that Mr. Jamieson fill the vacancy created at Station "D" in Etobicoke as a result of Mr. Hollingsworth's transfer.

Mr. Jamieson replied to Mr. Tingley on July 18, 1995, informing him of the Employer's position on the transfer withdrawal issue. He indicated that, as a general practice, the Employer allowed employees to cancel transfers when these employees were not yet working in their new position or if their former position had not yet been backfilled.

With regard to the Dundas position, Mr. Jamieson stated that since Mr. Hollingsworth was apparently not the most senior candidate with a valid transfer on file at the time the position was offered (Mr. Laufman being the most senior), the position should be offered to the most senior employee.

Mr. Jamieson, who wanted to advise the Managers of Labour Relations across the country of the Union's position with respect to the transfer issue, asked Mr. Tingley to confirm the following:

"1. Once an employee accepts an offer to transfer, then the employee must take the transfer. The Corporation cannot accept any notice from the employee withdrawing his/her acceptance of the transfer.

2. A union officer who transfers outside the office in which he holds a position, forfeits his position in the union local from which he is transferring, unless the local is also responsible for the office to which the employee is transferring. (This is what I have been told by the Union's Toronto Region.)"

On September 13, 1995, Mr. Tingley answered the two questions as follows:

"(1) Once an employee accepts an offer to promote, transfer or demote, he/she then becomes the holder of the new position. The collective agreement has a proviso should the employee require a delay due to relocation.

(2) This is a union constitution vs. a CUPW/CPC collective agreement issue. Mr. Hollingsworth, by virtue of his acceptance of the position (Hamilton local), automatically removed himself from union office in the Toronto Local."

With respect to Mr. Hollingsworth's situation, Mr. Tingley stated:

"... Mr. Hollingsworth accepted a transfer to Dundas, Ontario, on March 17, 1995. He was instructed to report to work on March 27, 1995. That's what should have happened. The collective agreement deals with the situation should a mistake be made or a violation occur.

In conclusion, Mr. Hollingsworth was offered and accepted a transfer from Toronto to Dundas in March of 1995. He should have reported to work in Dundas on March 27, 1995.

Should the Corporation have identified a mistake in July 1995 or should have a grievance been sustained at some point of time, the

collective agreement deals with this. However, nothing detracts from the situation that Mr. Hollingsworth was the owner of a position in Dundas in March 1995."

During that period, the Employer, notwithstanding the Union's position that Mr. Hollingsworth was the incumbent of the position in Dundas, took steps to fill that position. Following Mr. Hollingsworth's letter of May 17, 1995 advising the Employer that he was withdrawing his transfer request to Dundas, Canada Post informed Mr. Laufman on June 6, 1995 that he was eligible for that position. On June 15, 1995, Mr. Laufman was advised that he was the successful candidate, as he was the most senior employee eligible, and was requested to report to his new position on July 17, 1995. This offer was confirmed to Mr. Laufman on June 28, 1995.

However, on July 7, 1995, the Employer advised Mr. Laufman that his transfer to Dundas would be delayed until further notice. In its letter, the Employer mentioned to Mr. Laufman that it was "possible that the position was/is not vacant."

This triggered the filing of a grievance by the Union's Hamilton Local on Mr. Laufman's behalf. On August 10, 1995, the Union grieved the Employer's failure to grant Mr. Laufman the transfer to Dundas, claiming he was the successful candidate. Mr. Laufman's grievance was allowed by the Employer on September 8, 1995. Mr. Laufman's transfer was granted as of August 28, 1995, and he was awarded the position in Dundas.

Although the Union grieved the Employer's failure to grant Mr. Laufman the position in Dundas, it did not grieve the fact that Mr. Hollingsworth had returned to his position in Etobicoke on May 25, 1995 and that this position had not been backfilled, nor did it grieve the Employer's failure to "double-bank" the position (the practice of supernumerating a position in the case of an error in staffing) in Dundas as a result of having awarded it by mistake to the wrong candidate.

Notwithstanding its position regarding the Complainant's status as a member of the Hamilton Local since March 27, 1995, CUPW, in February 1996, sent Mr. Hollingsworth the 1996 version of the Toronto executive election "voting kit" issued to all members of the Toronto Local. Furthermore, in April 1996, the Union sent the Complainant his 1996 CUPW membership card, indicating that he was a member of the Toronto Local.

However, approximately two weeks after obtaining his CUPW Toronto Local membership card, the Complainant received a letter dated April 11, 1996 from Ms. Urchak, President of the CUPW Hamilton Local, informing him of the following:

***"RE: STATUS AS A MEMBER IN GOOD STANDING,
HAMILTON LOCAL***

It was brought to my attention that you hold a position in Dundas and as such, are now a member of the Hamilton Local. I am told you are concerned about your ability to attend general membership meetings, etc.

Please be advised that, as a member of the Hamilton Local and a member in good standing, you are certainly able to attend meetings of the Hamilton Local. You may participate in every way afforded you under the National Constitution and the Local By-laws. We were not aware of your status as we have not yet started receiving your union dues. This has now all been clarified and we are happy to welcome you into the local. We will notify National of the oversight immediately."

(emphasis added)

III

PRELIMINARY OBJECTION

In dealing with a complaint alleging violation of section 95(f) of the Code, the Board must take into account sections 97(4) and (5) of the Code. Section 97(4) of the Code provides:

"97.(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant has presented his grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and (c) the complaint is made to the Board no later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint."

Section 97(5) of the Code makes an exception to that rule, by giving the Board the discretion to hear a complaint by an employee who has not filed an appeal with the trade union, if the Board is satisfied that:

"(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay;

or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure."

The Union submitted that section 97(4) of the Code applied to this case and that the Board should therefore refuse to deal with the complaint because Mr. Hollingsworth had not attempted to avail himself of the appeal procedures available under the National Constitution. In particular, the Union argued that neither the complainant nor

anyone on his behalf, such as his agent or the President of the Toronto local, had attempted to appeal or otherwise challenge the National President's ruling on the interpretation of the transfer rule stated at article 1.17 of the National Constitution, and that no such challenge had been referred to the NEB or the Union's National Convention. CUPW relied on article 4.26 of the Constitution, which clearly suggests that internal mechanisms exist to challenge a presidential ruling such as the one made here by Mr. Tingley. Article 4.26 of the Constitution provides:

"The National President shall interpret the Constitution and his/her interpretation shall be upheld unless it is challenged and such a challenge is sustained by a majority of those voting in the National Executive Committee, National Executive Board or Convention."

The Complainant did not dispute the fact that he had not formally appealed the Union's decision that he had lost his right to hold office and to belong to the Toronto Local because he had accepted a transfer. However, the Complainant stated that he had been denied such a recourse since CUPW's executive officers had implemented the "national ruling" without knowing the proper facts or allowing him an avenue to appeal the decision. He relied on the fact that on May 16, 1996, statements had been made at the general membership meeting about his status vis-à-vis the outstanding transfer to Dundas. He was asked to leave the meeting and was not permitted to re-enter because he was deemed to belong to the Hamilton Local. As a result, he was never afforded a recourse to defend his case. Furthermore, he was never formally charged under the CUPW Constitution. The Complainant contended that if he had been charged with an alleged breach of the Constitution, he could have launched an appeal pursuant to the provisions of article 8. However, without a formal charge, there was no avenue open to him to challenge the decision to remove him from office.

The Union asserted that the Complainant had never been charged under the CUPW Constitution because this was not a disciplinary, but rather an administrative matter.

The Complainant's status in the Union had been determined in accordance with the Union's membership rules and policies. This administrative ruling could have been appealed to the NEB by the Toronto Local on behalf of the Complainant, culminating, if necessary, in a possible determination on the Union's National Convention floor. CUPW added that such an avenue was also open to the Complainant who could have filed an appeal to the National Convention. CUPW took exception to the suggestion that such recourses were not readily available to the Complainant, arguing that, as a matter of policy, appeals were generally given precedence in such instances.

The purpose of section 97(4) is to ensure that certain complaints against trade unions, such as complaints alleging that a trade union applied membership rules to an employee in a discriminatory manner, be made as a last resort, that is, after the aggrieved party has made reasonable attempts to exhaust all internal avenues of appeal. The aggrieved person is expected to have at least attempted to do so before turning to the Board for relief. If the Board determines that a complainant has failed to utilize the internal union remedies, it will consider the complaint to be premature and refuse to deal with it. If, however, the internal remedy is denied, not acted upon, or not made available to the complainant, a complaint can be made to the Board provided it is brought within a reasonable time (see Gerald Abbott (1977), 26 di 543; [1978] 1 Can LRBR 305; and 78 CLLC 16,127 (CLRB no. 114); Gérard Cassista et al. (1978), 28 di 955; and [1979] 2 Can LRBR 149 (CLRB no. 161); Mike Sheehan (1979), 34 di 726; and [1979] 1 Can LRBR 531 (CLRB no. 178); and Ronald Wheadon et al. (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRB no. 445), application for judicial review refused (1985), 85 CLLC 14,036 (Fed. C.A.).

In the present case, the Board respectfully disagrees with the Union's position that such internal mechanisms or recourses were readily available to the Complainant

under the circumstances. Having regard to the manner in which the events of this case unfolded, it is difficult to conceive how the Complainant could possibly have known exactly what action to take to challenge the Union's position when, from the time CUPW became aware of Mr. Hollingsworth's acceptance of a position in Dundas in May 1995 until the filing of the present complaint on August 15, 1995, he operated under the assumption that he had been disciplined.

Furthermore, the Complainant was at all material times denied access to the membership meetings of the local having jurisdiction over his place of work, and he was left out of the exchange of all correspondence concerning his situation. In the circumstances, therefore, even if it could be said that the Complainant, given his experience and former status in the Union, should have been aware that the Union's decision was administrative in nature, it is unrealistic to suggest that he could have done anything about it.

Moreover, CUPW's National Convention is held every three years, and even for delegates having the necessary standing to attend it, there are no guarantees that they will be successful in having an issue reach the floor. As the Board stressed in Ronald Weadon, supra:

"... It is unrealistic to suggest that aggrieved persons must follow the complete process which, in some instances could lead to a convention floor at Miami some two years later, as a prerequisite to access to the protection afforded by the Code. Not only could the expense of such a venture be formidable, the task of then being able to present a meaningful case to the Board after such a delay could be insurmountable."

(pages 145; 203-204; and 14,034)

Finally, unlike the circumstances in Paul R. Gillis et al. (1990), 79 di 131 (CLRB no. 773), on which CUPW relied, in the present case, the issue of internal recourses constituted one of the basis for the Complainant's allegations that he was removed from office in a discriminatory fashion contrary to section 95(f) of the Code. Central to Mr. Hollingsworth's claim was that CUPW had breached the rules of natural justice by failing to afford him an avenue to appeal his removal from office. This allegation being at the heart of the complaint before the Board, there is little doubt that this was not a case for which the problem had to wait for internal union mechanisms to operate and where it was mandatory to exhaust all internal avenues of appeal before coming to the Board for relief. Accordingly, the Union's preliminary objection pursuant to section 97(4) is denied.

IV

DECISION ON THE MERITS

The question before the Board is whether CUPW applied its membership rules to the Complainant in a discriminatory manner. The Complainant alleged that the Union had improperly discriminated against him in two ways: (1) by unlawfully removing him from his position as 4th Vice-President of the Toronto Local in May 1995; and (2) by denying him his membership rights in the Toronto Local.

It is common ground that members in good standing have the right to participate in the affairs of the trade union that has admitted them, unless they have been found guilty of some wrongdoing. In such a case, a trade union may properly restrict the exercise of the members' rights for a period of time as a disciplinary measure applied to sanction the members' wrongdoings; that is, provided of course, that the Union, in exercising its disciplinary power, does not act in a discriminatory manner.

CUPW did not charge the Complainant of any wrongdoing and there is no dispute that at all material times he was a member in good standing of the Union, and that he had been duly elected to the position as 4th Vice-President of the Toronto Local. The Union contended that all it had done here was to determine the local to which the Complainant belonged, by applying to him the constitutional rule governing transfers pursuant to the Union's policy on such matters. CUPW relied in this regard on the interpretation made by its National President, Mr. Darrell Tingley, of the transfer rule found at article 1.17 of the National Constitution. It is on that basis that the Union had determined that Mr. Hollingsworth, by having voluntarily accepted a position outside the Toronto Local's jurisdiction, had lost his right of membership and forfeited his right to hold office in the Toronto Local.

Mr. Tingley explained that the rule respecting transfers found at article 1.17 of the National Constitution and the restrictions it contains on the right to hold office were simply an extension of the principle providing that employees must be members of the local having jurisdiction over the postal station where they work. If union participation is most effective when exercised in the local responsible for an employee's workplace, the corollary is that union representation is also most effective when exercised by union officers who are also members of that local. The legal basis of this rule and its justification rest on both the collective agreement and the principle of effective union participation and representation.

Mr. Tingley told the Board that, consequently, the applicable rule governing transfers was that once employees had accepted a position in a new location, they had no choice but to report to the new location. Accepted transfers could not be rescinded or cancelled except in cases where the new position could not accommodate an employee's special needs. Moreover, accepted transfers could only be delayed for a

short period of time, and this only to accommodate an employee's relocation needs. CUPW put much emphasis on the rationale for this rule, stressing that transfers could not be deferred for extended periods as this would infringe upon the rights of other employees. Messrs. Tingley and Borch explained that the Union's policy provided for the expeditious filling of vacant positions to protect permanent positions by minimizing the Employer's use of term or relief employees and to avoid the ripple effect on bargaining unit members. Hence the need to keep delays in reporting to a minimum. If a position was awarded to the wrong applicant, the Union's policy was to insist that the Employer bear responsibility for its mistake by double-banking the position this, again, to maximize the number of permanent positions available. In Mr. Hollingsworth's case, the delay requested was for more than one year and had nothing to do with relocation needs.

The Complainant disputed the Union's contention that transfers once accepted could not be rescinded. Considerable evidence was adduced to establish the existing practice in the case of transfers. Several witnesses testifying on the Complainant's behalf stated that until Mr. Hollingsworth's situation came to light, the applicable rule was that transfers could be cancelled until the employee physically reported to the new position or until the position being vacated was backfilled. Transfers, it was said, only crystallized when the employee physically occupied the new position.

This was also stated to be the approach generally followed by the Employer. Mr. Jamieson, the Manager Labour Relations Central Area, confirmed this in his letter of July 18, 1995 to Mr. Tingley, and Mr. Mathew, the Canada Post Staffing Officer, testified that to his knowledge this was the prevailing practice.

The Complainant relied on this evidence to question the propriety of Mr. Tingley's "national ruling" on the transfer rule. However, he did not deny or otherwise suggest that the National President did not have the authority to make such a ruling pursuant to article 4.26 of the National Constitution.

For its part, CUPW brought evidence to refute the Complainant's position on the prevailing practice and applicable policy in the case of lateral transfers.

In the Board's opinion, irrespective of what may have been the practice at the time Mr. Hollingsworth accepted a transfer to Dundas on March 17, 1995, once the National President ruled on the issue and determined, for the purpose of assessing a member's internal status, the proper interpretation of the transfer rule, this interpretation became binding on the membership subject to their right to challenge the same. The Board does not question the National President's interpretation of the applicable rule governing transfers, nor his authority to make such a "national ruling" pursuant to article 4.26 of the Union's Constitution. The interpretation of a trade union's constitutional rule is an internal trade union matter and the Board's authority with respect to the regulation of internal trade union affairs extends only to ensuring that the terms of the Constitution are applied by the Union in a manner that is free from discriminatory practices and to ascertaining that a rule was not applied in a discriminatory manner.

In this regard, we adopt the remarks made by the Board in Mark Conlin (1994), 95 di 145; and 27 CLRBR (2d) 149 (CLRB no. 1088), a case involving a complaint alleging violation of sections 95(f), (g) and (h) and 96 of the Code by CUPW:

"Under the terms of the Constitution itself, the power of interpretation rests with the president. Although that exclusive power may well allow for some measure of abuse, it is nevertheless for the

membership itself to review and amend its Constitution. The Board is not mandated to interfere in internal union matters, and this clearly includes the interpretation of the union's Constitution. In cases such as the present, the Board's authority extends only to ensuring that the terms of the Constitution are applied by the union in a manner that is free from discriminatory practices. See Paul Horsley et al. (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRBR no. 861), upheld by Canadian Union of Postal Workers v. Paul Horsley, et al., no. A-292-91, May 29, 1992 (F.C.A.); James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRBR no. 492); Paul Dickinson (1993), 92 di 182; 22 CLRBR (2d) 53; and 93 CLLC 16,062 (CLRBR no. 1029); and Claude Pilette v. Syndicat des postiers du Canada, [1991] R.J.Q. 1015 (S.C.).

Although it is possible that inappropriate interpretations of the Constitution by the designate officer of the union may corroborate other evidence of discrimination, an adverse interpretation of the Constitution, on its own will not be interfered with by the Board nor will it ordinarily lead, without further evidence, to the conclusion that the adverse interpretation was invoked simply to discriminate against a specific individual."

(pages 149; and 153)

In the present case, the evidence showed that prior to indicating his intention to rescind his transfer, the Complainant had been made aware of the National President's interpretation of the transfer rule. Furthermore, the Union's NEB did consider the position advanced by the Toronto Local's President with respect to the Complainant's situation (which conflicted with that of the Union Executive), and followed up on his request to have Mr. Hollingsworth's status clarified. This was done before the start of the May 30, 1995 NEB meeting. Mr. Tingley's interpretation of article 1.17 of the National Constitution and its application to Mr. Hollingsworth's situation were then clearly reviewed and confirmed by the NEB. Mr. Gill was notified of this by Mr. Borch by mid-June 1995, and he did not challenge this "administrative" ruling on Mr. Hollingsworth's behalf.

The Complainant suspected that his removal had been motivated in part by the fact that some CUPW officials erroneously believed that he had actively participated in a raid attempt by former LCUC members during the fall of 1994. He claimed that certain CUPW representatives had seized the opportunity created by his deferred transfer to instigate his removal from the office of 4th Vice-President of the Toronto Local, an office for which he had been legitimately elected by the CUPW membership.

The Complainant's allegations pertaining to CUPW's "hidden agenda" were not substantiated and the Complainant did not establish that the rationale underlying the interpretation of article 1.17 of the Constitution was not based on objective and justifiable considerations. There was nothing to suggest that this ruling was a custom-made rather than generic ruling meant to apply to all employees. The evidence before us that the Complainant had accepted a transfer does not support the suggestion that the Union intended to intimidate him, and there is nothing to substantiate the charge that certain CUPW executive officers "had it in for him" because they believed that he had participated in the failed raid by LCUC supporters in 1994.

Furthermore, in asking to delay reporting to the position for a year, Mr. Hollingsworth must have known, or at the very least suspected, that he was stretching the boundaries of the rule. The Complainant could easily have informed the Union of his intentions and taken reasonable steps to get an official interpretation of the National Constitution and the collective agreement as to the consequences of his accepting the transfer. He chose not to do so. In the circumstances, the Union's decision to treat him as having forfeited his executive position and membership rights in the Toronto Local on receiving the Complainant's confirmation that he had accepted a transfer cannot be questioned.

Having found that the transfer rule as interpreted by CUPW's National President applied with respect to the assessment of the Complainant's status, the Board must now determine the effect of the cancellation of the Complainant's transfer on his membership standing. This requires consideration of two material periods, namely (1) the period immediately following Mr. Hollingsworth's acceptance of the transfer, and (2) the period following the cancellation of the Complainant's transfer and his return to his original position at Station "D" in Etobicoke.

Mr. Hollingsworth readily admitted that on March 8, 1995 he accepted a transfer to Dundas. This transfer was to be effective on March 27, 1995, but the Complainant asked that it be deferred for an extended period. On May 17, 1995, after becoming aware that he would be unable to do so with the Union's blessing and that CUPW adopted the position that he had given up his membership rights in the Toronto Local and his right to hold office there, he advised the Employer of his intention to rescind his transfer. On May 25, 1995, he resumed his letter carrier duties in Etobicoke, and on June 13, 1995, the Employer confirmed to the President of the Toronto Local that the Complainant had indeed rescinded the transfer, indicating further that it was returning the Complainant's file back to Toronto.

In the circumstances, the Board is of the view that the position taken by the Union until it learned of the cancellation of the transfer was justifiable. The Board accepts the Union's interpretation of the events and sees no reason to question the legitimacy of its finding that the Complainant did in fact accept a transfer and that the national ruling applied to the Complainant's situation. Accordingly, the Complainant could not avoid the consequences described by the Union of his accepting a transfer on his ability to continue to remain an executive officer of the Toronto Local.

However, the Board cannot concur with the Union's view that the Complainant was the holder of a position in Dundas when, having received confirmation from the Employer that Mr. Hollingsworth had declined his offer of a transfer to Dundas and still occupied his original position at Etobicoke "D" as a letter carrier, the Union elected not to grieve the situation.

In his letter to Mr. Jamieson on September 13, 1995, Mr. Tingley stated that Mr. Hollingsworth "was the owner of a position in Dundas in March 1995". However, in September 1995, the Laufman grievance had already been allowed and, as a result, the Dundas position had been definitively filled. Had the Union been consistent, it would have grieved the Employer's failure to fill Mr. Hollingsworth's position in Etobicoke after it had determined that he had accepted a transfer to Dundas, as well as the Employer's refusal to double-bank the position in Dundas, once it had been established that the position had erroneously been awarded to Mr. Hollingsworth.

Indeed, although the Union could not challenge the Employer's position with respect to Mr. Laufman's entitlement to the Dundas position because this would have been at odds with its grievance filed on Mr. Laufman's behalf on August 10, 1995 and settled on September 8, 1995, it could very well have filed a grievance seeking the double-banking of the Dundas position, and one requesting the posting and backfilling of Mr. Hollingsworth's position in Etobicoke. At the very least, the Union could have grieved the Employer's decision to accept the cancellation of Mr. Hollingsworth's transfer.

Mr. Tingley testified that the Union had not done so "out of respect for the Board". Mr. Hollingsworth had filed a complaint with the Board, and the Union felt that, under the circumstances, it would be more appropriate to wait until the Board had

disposed of the matter. Such an argument did not succeed in persuading us of the wisdom of the Union's approach. In fact, filing complaints with the Board does not suspend the applicable limitation period for filing grievances under the collective agreement. Furthermore, given the Union's position, filing these grievances would only have strengthened its case before the Board.

In choosing not to grieve the matter, the Union could not maintain, as it did, that the Complainant worked in Dundas and, accordingly, was no longer a member of the Toronto Local. Such a position was not supported by the facts which confirmed beyond dispute that, from the end of May 1995, the Complainant worked in Etobicoke and would not be transferring to Dundas. In refusing to review its decision in which it prevented the Complainant from exercising his membership rights in the Toronto Local after electing not to grieve the definitive filling of the position in Dundas and the Complainant's return to his position in Etobicoke, the Union departed from its policy providing that members must exercise their membership rights at the local where they work. In taking such a stand, the Union treated the Complainant differently from other members in a similar situation, thereby acting in a discriminatory manner. Like any member in good standing, the Complainant was entitled to exercise his membership rights in the local having jurisdiction over his place of work. This is the Union's policy, which should have been applied to the Complainant without discrimination.

In the present case, the Union's position had the effect of depriving the Complainant of his membership rights for nearly three years. The Complainant was kept in limbo throughout that time and was unable to exercise his membership rights. This resulted in effectively suspending and perpetuating the suspension of the Complainant's membership rights. There is no doubt that the Union's rigid position was largely motivated by its belief that the Complainant had committed some wrongdoing. In that

case, however, the Union should have charged him under the Constitution and afforded him the due process required before effectively depriving him of his membership rights.

Although the Complainant could not avoid the consequences of his accepting a transfer on his ability to remain an Executive Officer of the Toronto Local, he could not be unjustifiably deprived of his membership rights at the Toronto Local after his transfer was formally cancelled. At all relevant times, the Complainant's place of work was not Dundas but Etobicoke. Accordingly, the Board found that the Union violated section 95(f) of the Code by preventing the Complainant from exercising his membership rights at the Toronto Local from the time it became aware that he had returned to his original position in Etobicoke with the Employer's consent.

V

REMEDIES

Having so found, the Board must now turn to the issue of what are the appropriate remedies.

The Union submitted that the Board should dismiss the complaint without providing any relief and refuse to pay the Complainant's expenses because the Complainant did not come before the Board with "clean hands". The Union argued that the Complainant, by his own deceitful and dishonest conduct, had created the circumstances giving rise to the complaint, and that accordingly no remedy should issue in this case.

The "clean hands" doctrine rests on the principle that relief will be refused to a party that has behaved unconscionably. In fashioning appropriate remedies, the Board may

take this doctrine into consideration and refuse to make any order in respect of a violation of a section of the Code where it believes that it is just and equitable to do so, in view of the improper conduct of the party applying for the order. However, a remedy will only be withheld where the applicant has exhibited extraordinary misconduct and there is a connection between the conduct sought to be restrained and the applicant's egregious conduct. In this regard, we adopt the requirements enunciated by the B.C. Labour Relations Board in Perimeter Transportation Ltd. (1991), 9 CLRBR (2d) 264:

"The applicant must exhibit extraordinary misbehaviour before a court or the Council will deny the applicant relief from another's wrongdoing. Even if we were to accept the Employer's argument that the Union's conduct is illegal, egregious and justifies withholding remedial relief, there is another criterion which must be satisfied. I.C.F. Spry, in Equitable Remedies (Australia: Law Book Co., 1971) points out that the courts will deny relief only:

'if the inequitable conduct in question is shown to have had "an immediate and necessary relation" to the relief which is sought. The principle upon which courts of equity act is that protection will be denied the plaintiff where the right relief on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable act of the plaintiff, so that protection for what he claims involves protection for his own wrong. No court of equity will aid a man to derive advantage from this own wrong, and this is really the meaning of the maxim.'"

(page 274)

In the present case, although the Complainant did attempt to have the Canada Post staffing officer award him a position in Dundas over an employee with greater seniority and was successful in obtaining a delay in reporting to Dundas until after the

completion of his term of office in the Toronto Local, the Union did not establish that he had deliberately kept the question of his acceptance of a transfer secret.

The Union admitted that during its investigation of the matter, it did not verify if article 13.10 of the collective agreement, which requires the Employer to notify the Union when a position becomes vacant, had been complied with. As it turned out, Mr. Mathew readily admitted that this had not been done in Mr. Hollingsworth's case due to an oversight. It cannot be said, therefore, that Mr. Hollingsworth was at fault for having failed to notify the Union of his acceptance of a transfer when he could have expected this fact to be communicated to the Union through the normal channels. Thus, if the Union could take exception to Mr. Hollingsworth's lack of transparency with respect to his request for a delay in reporting, it could not justifiably blame him for not having been informed of his acceptance of a transfer in a timely manner.

The Union further argued that the Complainant was well aware that difficulties might arise as a result of deferring a transfer for such a long period and that when confronted by Union executives for having accepted a position in another local, he had used the fact that Canada Post had bypassed a senior applicant to argue that he was not entitled to the position in any case. The Complainant, as a Union officer, was aware of the National Union's policy providing for the expeditious filling of vacant positions to minimize the recourse to term employees and to avoid the ripple effect on bargaining unit members. The Union nevertheless conceded that it saw no need to charge the Complainant under the National Constitution. In point of fact, Mr. Borch admitted that the Union could find nothing under which to charge him.

It follows, therefore, that in the present case the Union's denial of the Complainant's membership rights at the Toronto Local was not, by its own admission, a response to an illegal act by the Complainant. Accordingly, there was no nexus between the

conduct sought to be restrained and the Complainant's alleged "egregious" conduct. The Complainant having committed no offence under the Union's Constitution, we cannot conclude that the Union's refusal to recognize him membership standing at the Toronto Local was brought about by an illegal action of the Complainant. In fact, it is just the opposite, as the Board determined that the membership rights relied on and which it was asked to protect have been unjustifiably and unlawfully denied.

Accordingly, the Board, having regard to the circumstances of the case, is of the view that this is a case in which it considers that relief should issue.

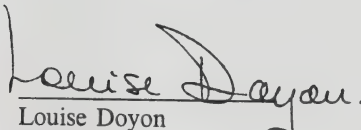
The Board clearly has jurisdiction to award costs as part of a remedial order in cases where it finds that there has been a violation of certain provisions of the Code. In this respect, reference may be made to National Bank of Canada (1984), 56 di 107; and 84 CLLC 16,038 (CLRB no. 466), and other cases. In that case, the Board stated:


"It is easy to see how an order for costs could remedy or counteract a consequence of a failure to comply within the meaning of section 189. If there had been no breach, there would have been no need to initiate proceedings before the Board, and the associated costs would never have been incurred. An order for costs would counteract that consequence. It is therefore clear that there is jurisdiction to order costs under section 189."

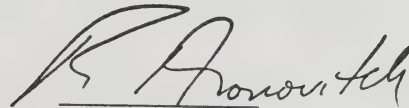
(page 118)

Such is the case here since the Union made it clear that it would not review its position or do anything to solve the problem until the Board had ruled on the issue.

That was clearly unfair under the circumstances and, for these reasons, the Board ordered that the Union allow forthwith Mr. Hollingsworth to exercise his membership rights at the Toronto Local, and further that the Union pay the reasonable legal fees and expenses incurred by the Complainant in the preparation and hearing of the instant complaint.


Louise Doyon
Vice-Chair


Véronique L. Marleau
Member


Roza Aronovitch
Member

information

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Summary

Construction & General Workers Union, Local 92 of the Laborers' International Union of North America; International Union of Operating Engineers, Local 955; International Association of Bridge, Structural & Ornamental Iron Workers, Local 720; General Teamsters, Local Union No. 362; United Brotherhood of Carpenters and Joiners of America, Local 1325; and International Brotherhood of Electrical Workers, Local 424, *applicants*, Ledcor Industries Limited; Standard Electric Ltd.; and BHP Diamonds Inc., *employers*, and Construction Workers' Union, Local 63, affiliated with the Christian Labour Association of Canada, *intervenor*.

Board File: 18228
CLRB/CCRT Decision no. 1225
May 4, 1998

Résumé

Construction & General Workers Union, section locale 92 de l'Union internationale des journaliers d'Amérique du Nord; Union internationale des opérateurs-ingénieurs, section locale 955; Association internationale des travailleurs de ponts, de fer structural et ornemental, section locale 720; Section locale 362 des Teamsters (General Teamsters); Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 1325; et Fraternité internationale des ouvriers en électricité, section locale 424, *requérants*, Ledcor Industries Limited; Standard Electric Ltd.; et BHP Diamonds Inc., *employeurs*, et Construction Workers' Union, section locale 63, affiliée à la Christian Labour Association of Canada, *intervenant*.

Dossier du Conseil: 18228
CLRB/CCRT Décision n° 1225
le 4 mai 1998

Application pursuant to section 109 of the Canada Labour Code by seven different unions for an order granting authorized representatives of the applicants access to employees of Ledcor Industry and Associates at the site of B.H.P. Diamond Mine at Lac de Gras. The applicants seek to displace the Construction Workers Union (CLAC) Local 63, which has been voluntarily recognized by Ledcor pursuant to a collective agreement which term will expire on May 21, 2001. Application granted.

Il est question en l'espèce d'une demande visant à obtenir une ordonnance aux termes de l'article 109 du Code canadien du travail, présentée par sept syndicats. Les requérants demandent que soit accordé à leurs représentants autorisés l'accès aux employés de Ledcor Industry and Associates au chantier de la B.H.P. Diamond Mine à Lac de Gras. Ils veulent déloger la section locale 63 de la Construction Workers Union (affiliée à la CLAC), qui a été reconnue volontairement par Ledcor en vertu de la convention collective en vigueur jusqu'au 21 mai 2001. La demande a été agréée.



CLAC and Ledcor opposed the application on the basis that: (1) the application for access does not meet the requirements of section 109 and (2) access to the site would be academic at this stage given the fact that none of the applicants could file an application for certification during the open period of the collective agreement pursuant to section 24(2)(d).

The applicants argued that the collective agreement does not create a bar to application for certification as it was never properly ratified by the employees. The applicants also question the validity of the collective agreement on the basis that the unit to which it applies does not conform with the standard construction unit recognized in the construction industry.

The validity of the collective agreement is upheld. Ratification of the collective agreement by the bargaining unit employees is not requirement under the Code. The Code does not require that the voluntarily recognized bargaining unit be appropriate. The voluntarily collective agreement may therefore operate as a bar to an application seeking certification for the same or substantially the same unit covered by the agreement.

La CLAC et Ledcor s'opposent à la demande pour les motifs suivants: (1) la demande d'accès ne satisfait pas aux exigences de l'article 109; (2) l'accès au chantier serait tout à fait théorique en cette période étant donné que, en vertu de l'alinéa 24(2)d), aucun requérant ne peut présenter une demande d'accréditation durant la période ouverte de la convention collective.

Les requérants prétendent que la convention collective ne fait aucunement obstacle à la demande d'accréditation puisque les employés ne l'ont jamais ratifiée comme il se doit. Ils remettent aussi en question la validité de la convention collective du fait que l'unité visée n'est pas conforme aux normes reconnues dans le secteur de la construction.

La validité de la convention collective est confirmée. Le Code n'exige pas la ratification de la convention collective par les employés de l'unité de négociation. Il ne stipule pas non plus que l'unité de négociation reconnue volontairement soit habile à négocier. La convention collective librement conclue peut donc faire obstacle à une demande d'accréditation pour la même, ou sensiblement la même, unité visée par la convention.

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The units for which the applicant trade unions seek to solicit union membership pursuant to section 109, are substantially different than the unit voluntarily recognized by Ledcor and CLAC. The Board also recognized that the description of the units would reflect the Board's policy to recognize craft units as appropriate in the construction industry. Therefore, the collective agreement does not operate as a bar to any applications for certification that the applicant trade unions may file.

The Board found that all the requirements in section 109 have been met and, pursuant to section 20(1), ordered that the applicant trade unions be entitled to access to the construction site under the terms and conditions agreed by the parties. The Board reserved its jurisdiction to determine the terms of access if the parties cannot reach any agreement on the terms of access.

Les unités auxquelles les syndicats requérants veulent avoir accès en vertu de l'article 109 sont sensiblement différentes de l'unité reconnue volontairement par Ledcor et la CLAC. Le Conseil considère par ailleurs que la description des unités est conforme à sa politique de reconnaissance des unités de métier dans le secteur de la construction. Par conséquent, la convention collective ne constitue pas un obstacle à une demande d'accréditation par les syndicats requérants.

Ayant statué que toutes les exigences de l'article 109 sont satisfaites, le Conseil ordonne, en vertu du paragraphe 20(1), que les syndicats requérants aient accès au chantier de construction selon les conditions qui seront acceptées par les parties. Le Conseil se réserve le droit de déterminer les conditions d'accès advenant le cas où les parties n'arriveraient pas à une entente à cet égard.

Reasons for decision

Construction & General Workers Union, Local 92 of the Laborers' International Union of North America;
International Union of Operating Engineers, Local 955;
International Association of Bridge, Structural & Ornamental Iron Workers, Local 720;
General Teamsters, Local Union No. 362;
United Brotherhood of Carpenters and Joiners of America, Local 1325; and
International Brotherhood of Electrical Workers, Local 424,

applicants,

Ledcor Industries Limited;
Standard Electric Ltd.; and
BHP Diamonds Inc.,

employers,

and

Construction Workers' Union (CLAC) Local 63, affiliated with the Christian Labour Association of Canada,

intervenor.

Board File: 18228
CLRB/CCRT Decision no. 1225
May 4, 1998

The Board was composed of Mr. Richard I. Hornung, Q.C., and Ms. Suzanne Handman, Vice-Chairs, and Ms. Roza Aronovitch, Member.

Appearances (on record)

Mr. Robert R. Blakely, for the applicants;

Messrs. David J. Ross, Q.C., and John Gormley, for Ledcor Industries Limited and Standard Electric Ltd.;

Mr. Thomas A. Roper and Ms. Frances R. Watters, for BHP Diamonds Inc.; and Mr. Daniel J. McDonald, Q.C., for the intervenor.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The applicant Unions filed an application with the Board pursuant to section 109 of the Canada Labour Code for an order granting their authorized representatives access to employees of Ledcor Industry and Associates Inc. ("Ledcor" or "employer") at the B.H.P. Diamond Mine ("BHP") site at Lac de Gras, N.W.T. BHP is developing a major diamond mining operation at that site. Ledcor is the contractor, hired by BHP, to carry out the construction phase of the operation.

The purpose of the application, as indicated in the applicants' initial letter, is to make a "displacement application" of the Construction Workers Union (CLAC) Local 63, affiliated with the Christian Labour Association of Canada (hereafter "CLAC") "...in respect of Ledcor, Standard Electric or any other construction company on site by the above captioned Unions." The Board, as well as both Ledcor and CLAC - by the responses filed - took this to reflect an intention to apply for certification pursuant to section 24 of the Code. In a subsequent letter, the Unions expanded on the purpose of their application indicating that it was designed, as well, to facilitate the "processing" of an application pursuant to sections 38(3) and 38(4) of the Code.

II

Both CLAC and Ledcor allege that the employees for which the applicants propose to make a "displacement application" are currently represented by CLAC, pursuant to a collective agreement between CLAC and Ledcor covering the period January 1, 1997 to May 31, 2000. The unit to which the collective agreement applies is described in Article 2:

"ARTICLE 2 - RECOGNITION

The Employer recognizes the Union as the sole agent of all employees in the bargaining unit working in the Northwest Territories and as defined in Article 2.02 and/or classified in Schedules 'A', 'B', and 'C' attached hereto and made part hereof."

Following its initial review of the evidence and representations on file, the Board directed its labour relations officer to determine the unit of employees for which each of the applicants intended to solicit support pursuant to section 109. On February 27, 1998, Union counsel responded to the Board's inquiry as follows:

"... The appropriate unit or units for each of the trade unions set out in the application are those craft units found in Alberta not (sic) particularly under the Alberta Board's Information Bulletin No. 11. These are the sorts of units that the Canada Board has held to appropriate for collective bargaining since at least 1979.

The particular units are as follows:

*Construction and General Workers Union, Local 92 -
General Construction Labourers*

*International Union of Operating Engineers, Local 955 - General
Construction Operating Engineers*

International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 720 - Two units - General Construction Reinforcing Iron Workers and General Construction Structural Iron Workers

International Brotherhood of Teamsters, Local 362 - General Construction Teamsters

United Brotherhood of Carpenters and Joiners of America, Local 1325 - General Construction Carpenters

International Brotherhood of Electrical Workers, Local 424 - General construction Electricians

Operative, Plasterers and Cement Masons International Association, Local 222 - Two units - General Construction Cement Masons and General Construction Plasterers

Enclosed is a copy of the Policy Bulletin from the Board for your easy reference. ... "

III

Ledcor and CLAC filed essentially similar responses in opposing the application, asserting that: (1) pursuant to section 24(2)(d) of the Code, the existing voluntary collective agreement between them bars the applicants from making the application; and (2) the application does not meet the requirements of section 109 in that it lacks particulars essential to the Board's determination.

According to Ledcor and CLAC, the applicants may not, pursuant to section 24, apply for certification of employees covered under an existing collective agreement unless they comply with one of the "open periods" provided for in the section. And, pursuant to section 24(2)(d) of the Code, the Unions cannot apply for certification until October 1, 1999, insofar as they are outside of the open periods contemplated therein. Furthermore, access to the site for organization purposes would therefore be

academic in that if the applicants intend to apply for certification they statutorily cannot do so.

The applicants respond that, although a collective agreement is in force, the agreement was never properly ratified. They say that the ratification which took place was with existing CLAC employees at the time and did not involve any employees who worked within the bargaining unit; that the ratification on January 16, 1997, was done at a time when no employees were present at the BHP site; and, finally, that those individuals who were present for the ratification vote have not obtained, and will not obtain, employment on the site. In addition, they argue that although the agreement is an agreement that pertains to the construction industry, it is not an "industry" agreement as generally recognized by either this Board or provincial labour relations boards that have jurisdiction in the construction industry.

For the above reasons, the applicants argue that the voluntary collective bargaining agreement is neither valid nor effective.

The owner of the project, BHP Diamonds Inc. ("BHP"), did not engage in the debate on the collective agreement or its validity but rather argued that the applicants' request did not disclose sufficient information to facilitate either a Board Order or a BHP response. It contended that since the Board must specify, in any access order, the number of representatives, the method of access, the times of access and the duration of such access, the application required particularization in these respects.

The concerns raised by BHP were mirrored by CLAC and Ledcor; however, in addition each of them adopted the position that the application should be dismissed because of the lack of details provided.

In response, the applicants indicated that if the Board granted an order they would - considering the number of applicants and the special circumstances - attempt to negotiate the precise terms of access directly with Ledcor and BHP. If that failed,

they suggest that the matter could then be submitted back to the Board for determination.

IV

APPLICATION OF SECTION 38(3)

The Unions' application, insofar as it relates to sections 38(3) and (4) of the Code can be dealt with summarily. Those sections provide as follows:

38. (3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.

(4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent for a bargaining unit,

(a) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent,

(i) at any time during the first year of the term of that collective agreement, and

(ii) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and

(b) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24."

(emphasis added)

The language of these sections makes it evident that any application for an order declaring that CLAC is not entitled to represent the employees in the bargaining unit described within the recognition clause of the voluntary agreement must be brought by an "employee". Accordingly, the applicant Unions simply do not have status to bring an application under section 38(3).

V

VALIDITY OF THE VOLUNTARY COLLECTIVE AGREEMENT

The collective agreement referred to was signed by the parties pursuant to a voluntary recognition of CLAC by the employer. As is often the case with major projects in the construction industry, the voluntary recognition took place and the collective agreement was negotiated by Ledcor and CLAC prior to the commencement of the construction project. According to CLAC, the collective agreement was subsequently "ratified" by the employees on January 16, 1997.

By virtue of section 16(p)(vi) of the Code, the Board has the power, in relation to any proceeding before it:

"(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(vi) a collective agreement has been entered into,"

The above determination must be made in accordance with the definition of "collective agreement" contained in section 3(1) of the Code (see Donald William Murray Movers

Limited (Crown Moving and Storage) (1974), 7 di 11; [1975] 1 Can LRBR 317; and 75 CLLC 16,148 (CLRB no. 37)).

Section 3.(1) provides:

"3.(1) In this Part,

'collective agreement' means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters."

Ratification of the collective agreement by the bargaining unit employees is not a requirement under the Code. The definition of "collective agreement" requires only that the agreement be entered into between the employer and the bargaining agent. It does not specify, nor refer to, bargaining unit employees. Ratification is an internal matter between the trade union and the bargaining unit employees. Consequently, ratification will be a pre-condition for the existence of a valid collective agreement only when the union's constitution requires it. (See in this regard the comments of the B.C. Board in Lytton Lumber Ltd., no. 305/85, October 23, 1985).

In the present case CLAC argues that, in any event, ratification took place on two occasions. Were ratification a prerequisite under the Code or CLAC's constitution, we might well have examined the process used. However, since there is neither a requirement that ratification itself must take place nor the format in which that must occur, the applicants' claims as to the invalidity of the voluntary collective agreement on that basis are unfounded.

We reach a similar conclusion with respect to the Unions' argument that the voluntary collective agreement between CLAC and Ledcor is invalid because the unit to which it applies does not conform with the standard construction unit recognized in the industry. The Board cannot refuse to acknowledge a voluntarily recognized

bargaining agent simply because it finds that the unit chosen by the parties is not appropriate pursuant to the criteria it would normally apply. As indicated by this Board in Northern-Loram Joint Venture (1985), 59 di 180; and 9 CLRBR (NS) 218 (CLRBR no. 498):

"Let us assume we did make such a determination and decided one of the units was appropriate and one was not. Where would that get us? How would that make the collective agreement involving the inappropriate unit invalid? There is nothing in the Code which requires that a voluntarily recongized unit be appropriate. Appropriateness is the preserve of certification. Where only voluntarily recognized units are involved, there is no purpose to our looking at appropriateness."

(pages 215; and 253; emphasis added)

The opportunity provided to the parties by the Code to voluntarily negotiate a collective agreement recognizes, by extension, that they may define the unit that they find appropriate for their purposes without the Board's intervention. As stated by George W. Adams in Canadian Labour Law, 2d ed. (Aurora, Ont.: Canada Law Book Inc., 1993):

"... The advantages of voluntary recognition are that: it avoids the expense and delay of certification proceedings; it gives the parties a free hand in defining the bargaining units; it represents a non-adversarial manner by which to commence a collective bargaining relationship. ..."

(page 7-70)

As reflected in Northern-Loram Joint Venture, supra, the Board will uphold the validity, and give effect to, voluntary collective agreements even where it questions the appropriateness of the units referred to therein.

VI

Section 109 provides as follows:

"109.(1) Where the Board receives from a trade union an application for an order granting an authorized representative of the trade union access to employees living in an isolated location on premises owned or controlled by their employer or by any other person, the Board may make an order granting the authorized representative of the trade union designated in the order access to the employees on the premises of their employer or such other person, as the case may be, that are designated in the order if the Board determines that access to the employees

(a) would be impracticable unless permitted on premises owned or controlled by their employer or by such other person; and

(b) is reasonably required for purposes relating to soliciting union memberships, the negotiation or administration of a collective agreement, the processing of a grievance or the provision of a union service to employees.

(2) The Board shall, in every order made under subsection (1), specify the method of access to the employees, the times at which access is permitted and the periods of its duration."

(emphasis added)

As is readily apparent from a reading of the section, an order under section 109 is reserved for the purposes of "soliciting union membership". Support cards gathered for the purposes of establishing union membership and support for a certification application are valid for a six-month period. (See section 24(b) of the Board's Regulations). For an order under section 109 to be effective, there must at least be a possibility that the union can bring a timely application for certification following the union's solicitation of memberships envisioned therein.

If there is a valid collective agreement already in force for a unit that is the same, or substantially the same, as the one for which the applicants wish to "displace" CLAC, no application for certification for that unit is permitted unless it is submitted within the time limits set forth in section 24 of the Code. In such a case, no purpose would be served by granting an access order under section 109.

In the present case, the voluntary collective agreement, in its recognition clause, encompasses a unit of **all employees** employed by Ledcor in the Northwest Territories - which of course includes the BHP site. The issue, nevertheless, remains whether or not the applicant Unions are now prevented, by virtue of section 24, from bringing an application to be certified as the bargaining agents for units that vary from the unit described in the voluntary agreement between CLAC and Ledcor.

Section 24 of the Code reads as follows:

"24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation.

(3) An application for certification under subsection (2) in respect of a unit shall not, except with the consent of the Board, be made during the first six months of a strike or lockout of employees in the unit that is not prohibited by this Part.

(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until

(a) the application has been withdrawn by the trade union or dismissed by the Board, or

(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board."

Section 24(1) provides that a "trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining..." may, subject to the time prescriptions, apply to the Board to be certified. The union is given broad berth, in a section 24 application, to define the unit it considers appropriate. If there is an existing certification or collective agreement "...applicable to the unit..." in force at the time of the union's

application, which is substantially the same as the one that the union described in its application pursuant to section 24(1), the timeliness of the application must be determined pursuant to the provisions of section 24(2).

Before applying the time limits under section 24(2), the Board is often called upon to decide whether the unit described by the union in its section 24(1) application is the same or substantially the same as the unit for which an existing certification order or collective agreement (voluntary or otherwise) exists. Ultimately, it is also the Board, by virtue of section 28, that must decide whether or not the unit that the union described in its section 24(1) application "...constitutes a unit appropriate for collective bargaining".

Where application is made by a union to be certified as the bargaining agent for a unit that the Board determines to be distinct from the unit voluntarily recognized by the parties, the voluntary agreement cannot act as a bar to the application for that new unit. Similar rules apply in this regard where certification applications refer to certified units that the Board considers substantially different from the units covered by the collective agreement in force on the date the application was filed; (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383); Maritime Employers' Association and Terminaux Portunaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRBR no. 642); and Télébec-Ltée, October 14, 1994 (LD 1362)).

In industrial settings, the Board has a well-established policy that favours certification of broad-based bargaining units. In most industrial settings, an attempt to fragment a larger "all employee" unit and replace it with a smaller unit configuration - which is included therein - would not meet with the Board's approval. (see Brinks Canada Limited (1994), 95 di 100 (CLRBR no. 1084). Nor, in those circumstances, would an application for a smaller unit - included within the larger unit - be ordinarily regarded as constituting a unit that is "different or substantially different" from the larger all-

employee unit for the purposes of the time prescriptions contained in section 24(5) of the Code.

However, in the construction industry it is another matter:

"The construction industry, to state the obvious, is like no other. The owner of the property is the client and the purchaser of the new structure. The owner hires an architect or engineer to design and oversee the construction and the overall building project is put up for tender to the best bid. The general contractor who wins the bid manages the entire project. The production rhythm in construction has to be totally different from that in manufacturing where the employees all work together on one location, at one time, in one integrated operation, mass producing goods which are sold for use elsewhere.

The general contractor does some of the basic construction work itself, but in most cases the general contractor will subcontract the skilled technical work (electrical, plumbing) to trade contractors who each make their own special contribution to the undertaking. Corresponding to each of these subcontractors are the several kinds of tradesmen who have the specialized skills that are required at different phases in the construction project. The normal pattern is for each firm to agree to have its supervisors and tradesmen and equipment at the job, at the right point in the construction schedule to perform their task. When they are finished, both contractor and tradesmen go their own separate ways, to perform the same kind of operations on different projects, at other sites and other new contracts.

The coordination of the construction and the trade specialists that work on it is accomplished by a network of contractual relationships negotiated and renegotiated for each project. The pattern of construction work is erratic. When any one project is complete there is no guaranty that there will be another job for the firm to move on to.

...

'the character of the employment relationship in the construction industry is very different from what it is in the typical plant. There is no footing for the kind of tenured status which employees now enjoy under most collective agreements. As well, there is no basis for the kind of

enduring association which a group of employees can develop in an industrial bargaining unit. Any one job for the construction worker is short and fleeting and he must be prepared to be highly mobile, shifting from project to project across a wide geographic area.'

Weiler, Paul: Reconcilable Differences 1980 Carswell

It is the construction union which fills a vacuum, which provides a continuity and structure in the tradesmen's working career. Each of the important work specialities historically developed its own craft union. Many of these unions have had a century of representation of that skilled trade ... That attachment between the tradesmen and the craft union endures throughout his entire life in the construction industry: from his initial point of entry into and apprenticeship program which the trade union either controls or in which it is heavily involved, through the distribution of available work by the union's hiring hall, and culminating in the payment of health and welfare insurance and pension benefits which the union has accumulated for him through contributions made by contractors for every hour that he has worked."

(Report Re: Construction Industry in Saskatchewan;
Saskatchewan Department of Labour; (1985) at pp: 8-11)

Although it is commonplace in the construction industry to have voluntary recognition agreements concluded between unions and employers prior to the commencement of a construction project, such agreements are, with rare exceptions, accepted "industry" agreements in standard construction industry craft unit configurations.

A review of the various Canadian labour boards' statutes and jurisprudence makes it abundantly clear that "wall-to-wall" units, as described in the voluntary agreement between CLAC and Ledcor, do not conform to the "standard" units favoured, in one form or another, by all labour boards across this country as being appropriate for certification purposes in the construction industry.

In Interior Contracting Company Limited (1979), 29 di 51; and [1979] 1 Can LRBR 248 (CLRB no. 174), this Board, in a plenary decision, stated its policy with respect to construction industry bargaining units that fall within its jurisdiction:

"With the increase in the North of construction industry organizing over the past few years and the anticipated increase in construction industry activity in the near future, particularly in the Yukon Territory, the Board considers it to be beneficial to harmonious and stable industrial relations to standardize bargaining unit descriptions in the industry. In so doing we are following a practice adopted in British Columbia in 1959, in Alberta in 1978, in Saskatchewan many years ago and in Manitoba in 1970. These are the areas where most employers and unions active north of the 60 degree parallel normally have their base. They are familiar with this practice and to a great extent it has been beneficial.

...

In describing standardized craft units we are exercising our exclusive jurisdiction under sections 118(p)(v) and 125 of the Code to determine appropriate bargaining units. Apart from the reasons stated above this policy is intended to encourage employers to recognize the realities of the craft organization of trade unions, avoid overlap in bargaining rights of construction trade unions and avoid the necessity of repeated application to vary certification orders that are limited in their scope to classifications employed when an application for certification was made. Insofar as this new policy reflects a departure from the Board's decision in Majestic Wiley Contractors Limited, (1975), 11 di 43; and 75 CLLC 16,179 (CLRB no.51), the approach in that decision has been outstripped by construction industry growth in the North and is no longer the policy of the Board."

(pages 54-55; and 250-251)

In P.C.L. Construction Ltd. (1984), 57 di 95; and 85 CLLC 16,001 (CLRB no. 481), the Board had a further opportunity to discuss, and specifically define, the craft units that it deemed appropriate in the construction industry in the N.W.T. In its reasons for decision, the Board referred to broad and expansive authorities and ultimately concluded that the labour relations purposes that the Board must serve were best

achieved by defining appropriate units in the construction industry in the N.W.T. along geographic and craft lines, which essentially reflect those that apply in Alberta.

The above references are not to suggest that the unit voluntarily recognized by Ledcor and CLAC in their collective agreement is, as argued by the Unions, invalid. Reference is made to the Board's policy and prior jurisprudence simply for the purposes of underlining the apparent difference in the unit configuration described in the recognition clause of the voluntary collective agreement between CLAC and Ledcor and those units which the Board has, in the past, considered appropriate in the construction industry.

At this juncture, it is not necessary for us to delve into the issue of whether or not the units, for which the Unions seek to solicit union membership pursuant to section 109, are appropriate for certification under section 28 of the Code. Should the Unions subsequently apply for certification, the appropriateness of the units sought, as well as any objections to the same by Ledcor, CLAC, or BHP, can be addressed within the confines of that application.

Suffice it to say, at this stage, that the units for which the applicants intend to solicit union membership are units that the Board has, in the past, found to be appropriate in the construction industry and that are different, or substantially different, from the unit described in the recognition clause of the voluntary collective bargaining agreement between CLAC and Ledcor.

Accordingly, we find that the units which the applicant Unions consider to constitute an appropriate unit - and for which they apply pursuant to section 109 for access to organize in order to make application to the Board pursuant to section 24(1) - are ones in respect of which "...no collective agreement...is in force and no trade union has been certified...as the bargaining agent" as of the date the application was filed. In the result, the units sought may be the subject of a certification application "at any time" under section 24(2)(a) of the Code.

VII

The information on file indicates that:

"...access to the mine site is by air: there are daily flights from Yellowknife on a plane chartered by BHP Diamonds, and weekly chartered flights from Edmonton."

(Letter dated July 25, 1997, from counsel for BHP).

Considering that chartered air service, as described, appears to be the only access to the site, we are of the view that the employees, to whom the Unions require access for the purpose of soliciting union memberships, are in fact living in an isolated location as envisioned by section 109.

Ledcor argued that employee contact was otherwise possible without Union representatives attending at the minesite itself, because some current Union members are presently working for Ledcor at the site and because the Unions' representatives had been seen photographing some of the employees arriving or departing on the charters referred to above, at the Edmonton Airport. In Dome Petroleum Limited et al. (1978), 31 di 189; [1978] 2 Can LRBR 518; and 78 CLLC 16,153 (CLRB no. 153), the Board reviewed similar arguments and concluded that:

"...for the purpose of soliciting union membership, the physical presence of a union representative, who can answer questions about the union, its operation and administration, and the obligations and benefits of membership, is reasonably required."

(pages 204; 530; and 590)

The fact that some union members may in fact be working for Ledcor does not, in the circumstances, constitute the access for "an authorized representative of the trade union" envisioned by the Code. Nor does the kind of contact that Ledcor suggests is available at the arrival and departure of the chartered aircraft provide a sufficient basis for the Unions to conduct an organizing campaign. In our view, the ability to do so reasonably requires that representatives of the Unions be provided access to the site itself.

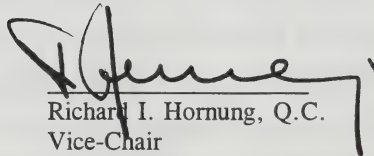
Other than as set forth above, none of the parties to the application seriously disputed the statement of BHP's counsel or suggested that access to BHP's minesite was otherwise practicable without a Board order. Rather, the gist of the representations centered around the applicability of section 24, as discussed earlier, and the failure of the Unions to specify the terms of access they required.

However, in their application, the Unions indicated that if the Board granted their application - notwithstanding the objections raised pursuant to section 24 - they are prepared to attempt to negotiate the terms of access to the site with Ledcor and BHP; and, failing an agreement in that regard, suggested that the matter be referred back to this Board.

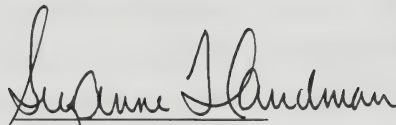
In our view that proposal, in the circumstances, is a sound one.

Insofar as section 24 does not constitute a bar to an application for certification for the units described by the Unions - and the requirements of section 109 are otherwise met - the Board, pursuant to section 20(1) of the Code, orders that the applicant Unions are entitled to access to the BHP construction site at Lac de Gras, N.W.T. "for purposes relating to soliciting union memberships" as referred to in section 109 of the Code.

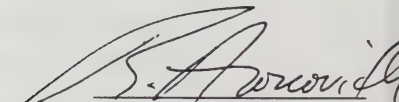
The parties will have 30 days in which to resolve, by direct negotiation, the nature and terms of the access to be provided. The Board reserves jurisdiction to settle this matter, upon application by any party, for the purposes of determining and delineating the terms of access necessary to fulfill the Board's order - as set out above - in the event agreement cannot be reached.



Richard I. Hornung, Q.C.
Vice-Chair



Suzanne Handman
Vice-Chair



Roza Aronovitch
Member

information

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Summary

Frank Stolp, *complainant*, Power Workers' Union, CUPE Local 1000, *respondent*, and Ontario Hydro, *employer*.

Board File: 17094

CLRB/CCRT Decision no. 1226
June 9, 1998

Résumé

Frank Stolp, *plaignant*, Power Workers' Union, section locale 1000 du SCFP, *intimé*, et Ontario Hydro, *employeur*.

Dossier du Conseil: 17094

CLRB/CCRT Décision n° 1226
le 9 juin 1998

This case deals with a section 37 complaint against the Power Workers' Union for its refusal to proceed to the arbitration of a dismissal grievance.

La présente affaire porte sur une plainte déposée en vertu de l'article 37, par suite du refus du Power Workers' Union de renvoyer à l'arbitrage un grief concernant un congédiement.

The complainant was dismissed after the investigation of a complaint that he had sexually harassed a co-worker. The Union decided, in light of the complainant's disciplinary record, that his chances of success at arbitration would be minimal. Therefore, a monetary settlement was negotiated since the option of reducing the dismissal to a suspension was "not on the table" according to the Employer.

Le plaignant a été congédié à la suite d'une enquête liée à une plainte de harcèlement sexuel portée contre lui par une collègue. Le syndicat avait décidé, compte tenu du dossier disciplinaire du plaignant, que les chances de succès à l'arbitrage étaient minimes. Par conséquent, les parties ont négocié un règlement financier, étant donné qu'il n'était pas question de transformer le congédiement en suspension, selon l'employeur.

The Board held that the duty of fair representation commences as soon as there is a prospect of discipline or an employee's job interest is at stake. The Union must expend its efforts in keeping with its obligations under section 37 of the Code. However, in the present case, no adverse determinations could be drawn against the Union for its conduct as it related to the investigation of the sexual harassment complaint.

Le Conseil a jugé que le devoir de représentation juste existe dès que surgit la possibilité de discipline ou de perte d'emploi. Le syndicat doit faire des efforts, conformément à ses obligations aux termes de l'article 37 du Code. En l'espèce, cependant, le Conseil ne pouvait arriver à une décision défavorable relativement à la conduite du syndicat en ce qui avait trait à l'enquête portant sur la plainte de harcèlement sexuel.



The Board found that the Union breached section 37 when it failed to: independently investigate the sexual harassment complaint; examine the complainant's disciplinary record in detail; canvass his record with him to ensure that the employer's account of the same was accurate; and finally, to properly consider the application of a provision of the collective agreement that could have been critical to the outcome of the complainant's grievance.

Given that the complainant accepted the \$60,000 cheque, cashed it and has utilised the funds, further representations are needed from the parties on the issue of appropriate remedy. Therefore, pursuant to section 20 of the Code, the Board retained jurisdiction to order a remedy in this matter.

Le Conseil a jugé que le syndicat a enfreint l'article 37 en ne menant pas d'enquête indépendante à la suite de la plainte de harcèlement sexuel, en n'examinant pas en détail le dossier disciplinaire du plaignant, en ne discutant pas avec lui pour vérifier la description dont en faisait l'employeur, et en ne considérant pas convenablement l'application d'une disposition de la convention collective qui aurait pu influencer l'issue de la plainte du plaignant.

Étant donné que le plaignant a accepté et encaissé le chèque de 60 000 \$ et qu'il a utilisé l'argent, les parties doivent présenter d'autres observations sur la question du redressement qui s'impose. Par conséquent, conformément à l'article 20 du Code, le Conseil s'est réservé le droit d'ordonner un redressement dans la présente affaire.

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Reasons for decision

Frank Stolp,

complainant,

Power Workers' Union, CUPE Local 1000,

respondent,

and

Ontario Hydro,

employer.

Board File: 17094

CLRB/CCRT Decision no. 1226

June 9, 1998

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Michael Eays and Patrick H. Shafer, Members.

Appearances:

Mr. Raj Anand, for the complainant;

Mr. Donald K. Eady, for the respondent; and

Mr. David Mombourquette, for the employer.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

Frank Stolp filed a complaint against the Power Workers' Union (the Union or PWU) alleging that its officers, in failing to proceed to the arbitration of his dismissal grievance, breached section 37 of the Code.

II

Frank Stolp was employed by Ontario Hydro (the "Employer") for more than 24 years. On February 8, 1995, a co-worker filed a sexual harassment complaint against him. Pursuant to the Employer's policy (Exhibit 6.27), an internal investigation committee was struck. The committee included Mr. Fry, a senior representative of the Union. Following completion of the investigation and a review of the report of the investigation committee, the Employer dismissed Stolp on May 31, 1995.

Following his dismissal, the Union filed a grievance on Stolp's behalf. The grievance proceeded to the third stage in a fashion consistent with the terms of the collective agreement. On August 25, 1995, the step three grievance meeting was held between representatives of the Union and the Employer. A committee of the Union met prior to meeting with the Employer representatives in order to review Stolp's grievance. This committee, in keeping with the Union's accepted process, had the ultimate authority to determine whether or not to proceed to arbitration.

At that meeting the committee had in hand a copy of Stolp's disciplinary record (Exhibit 3(a)) prepared by the Employer. It could hardly be said that Frank Stolp had an "unblemished" record with Ontario Hydro. A review of his file reveals that since the commencement of his employment he received a number of disciplinary warnings and notations on his file for assorted misconduct on the job. The most recent disciplinary notation on his record - prior to the sexual harassment complaint that led to his dismissal and is the subject of the present complaint - was dated March 8, 1991.

Following the Union committee's discussions, it was determined that, in light of Stolp's considerable record, the chances of success at arbitration were slim. The committee, therefore, decided to try to negotiate a settlement on Stolp's behalf. It had initially tried to have the dismissal reduced to a suspension. When the committee was informed by the Employer's representatives that that alternative was simply "not on

the table", it opted instead to pursue a monetary settlement and eventually accepted an amount of \$60,000.

There is no dispute that, prior to this meeting, the Union did not conduct its own investigation of the circumstances surrounding the sexual harassment allegation, nor did it interview the complainant or the witnesses called before the Employer's investigation committee. It essentially accepted the report on its face, based in part on the integrity and experience of the union officer who served on the committee, and agreed with its conclusions.

The witnesses called on behalf of the Union were candid about the fact that, although they were in possession of a lengthy employer summary of the various disciplinary measures taken against Stolp during the course of his career with Ontario Hydro, they did not review that document with him nor obtain his explanation, if any, for those items that appeared on his disciplinary record.

The Union's witnesses were equally candid in their admission that, prior to accepting the settlement, they did not consider obtaining an opinion to determine the effect of Article 2A.4 of the collective agreement. Nor, for that matter, did they seriously pursue the position, on Stolp's behalf, that the Article applied to Stolp. The provision reads as follows:

"2A.4 Unless otherwise agreed to, after a letter(s) of reprimand has been on an employee's file for a maximum of two years, and there have been no further occurrences, then the letter(s) of reprimand will be removed from all files."

In fact, the Union took the position that the collective agreement provision referred to above was a "new" provision that had not yet been tested by arbitration. They were therefore not certain that it would have applied to Stolp or have had a determinative affect on his grievance.

Finally, although it was not strictly required to do so, the Union made no attempt, prior to accepting the settlement, to contact Stolp in order to obtain his input with respect to or his acceptance of the settlement.

III

Considerable time was spent in evidence and argument in relation to the Union's failure to aggressively represent Stolp during the investigation of the sexual harassment complaint by the committee struck by the Employer. According to Stolp, other than being interviewed by the investigation committee, he did not have an opportunity to face his accuser or the witnesses and, therefore, test his version of the events against those of the complainant. The Union's only representation, according to Stolp, consisted of a meeting he had with the Union representative immediately prior to his being interviewed by the committee. During this interview, he was accompanied by the Union representative.

Where the complaint is brought by one union member against another, there are profound employee interests involved on each side of the spectrum. The complainant has a personal and reputational stake in the outcome of the complaint. The alleged offender similarly has a serious job interest at stake as well as a concern with regard to his or her reputation. The Union is simply in a "no win" situation.

To say the least, a union is put in a difficult position in sexual harassment complaints involving its members. The process is one that, in most cases, is determined by an employer policy directive. Often, the process is not contained in the collective agreement and the union does not have a role in its promulgation nor implementation.

Here, while the matter was before the sexual harassment committee, the Union played a limited representational role. Its representative met with Stolp prior to appearing before the committee, and attended there at his side. In addition, the Union

representative made "informal" attempts to assist Stolp by raising the matter with his management counterpart while the committee was deliberating. Other than that, the Union relied on the fact that a well-respected Union representative, in whom they had confidence, sat on the committee and would ensure that Stolp's interests would be dealt with fairly.

The suggestion was made that the Union's failure to represent Stolp at the meetings of the committee, or to otherwise cross-examine or interview the complainant and the witnesses called before it, amounted to a failure to represent Stolp as required by section 37 of the Code. We do not agree.

The duty of fair representation commences as soon as there is a prospect of discipline or an employee's job interest is at stake. The union, once aware of the situation, must expend its efforts on behalf of its jeopardized member in keeping with its obligations under section 37. This is perhaps particularly so in sexual harassment situations. As the British Columbia Labour Relations Board stated, in John Harrop no. B430/97, December 10, 1997:

"It is because of the seriousness of these [sexual harassment] matters that a union has an obligation to investigate and to provide adequate representation from the very start. ..."

(page 17)

However, in the present case, no adverse determinations can - nor should - be drawn against the Union for its conduct as it related to the investigation of the sexual harassment complaint.

Here, the complaint and investigative process are set forth in an employer directive (Exhibit 6.27), that does not provide for the confrontation of witnesses or the complainant at the committee stage, which counsel for Stolp suggested the union should have advanced on his behalf.

In our view, considering the competing interests involved, the Union did what it could for Stolp during the investigative stage of the sexual harrassment complaint. Its failure to meet the requirements of section 37 lay in its representation of Stolp, and the prosecution of his grievance, following his dismissal.

IV

While the Board, in determining a section 37 complaint, will normally avoid interpreting the terms and conditions contained in a collective agreement, it is nevertheless significant that the provision, referred to in Article 2A.4, existed and that it was neither applied nor put to the Employer by the Union with respect to Stolp.

If, in fact, the provision in the collective agreement did apply to Stolp, it may have been critical to the outcome of his grievance insofar as he would then have had a "clean" disciplinary record to be put before the arbitrator.

The Board will not interfere in a union's decision not to proceed with a grievance where the union has conducted an investigation and reached its conclusion on all of the available facts, nor does it sit in appeal from the decision made by the Union. (See David Coull (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957); and Peter Elcombe (1992), 88 di 222; and CLRBR (2d) 234 (CLRB no. 953)). Although the Board will not second guess a union's decision not to proceed to arbitration, it will scrutinize the union's actions to ensure that the decision was made in a conscientious manner consistent with its obligations under section 37. Understandably, in dismissal grievances the union's conduct will be looked at more closely. In Jacques Lecavalier (1983), 54 di 100 (CLRB nbo. 443), the Board stated that:

"...it would hold the bargaining agent to a much stricter standard where the career path of a member of the bargaining unit may be seriously affected, the most obvious example being dismissal..."

(pages 124-125)

See also Malcom Horton (1994), 92 di 40 (CLRB no.1015), at page 44; and Thomas Zuk and Gloria Linfield (1985), 62 di 167; and 85 CLLC 16,060 (CLRB no. 531).

We are satisfied that the members of the committee who met to determine the fate of the dismissal grievance reached the conclusion to settle the matter in what, they believed, to be Stolp's best interests.

However, the union's failure to: independently investigate the sexual harassment complaint (as alluded to earlier) to examine Stolp's disciplinary record in detail, to canvass his record with him to ensure that the employer's account of the same was accurate and, finally, to properly consider the application of Article 2A.4 of the collective agreement to Stolp's record, amounts, in the circumstances of the present case to arbitrary conduct that violates section 37 of the Code.

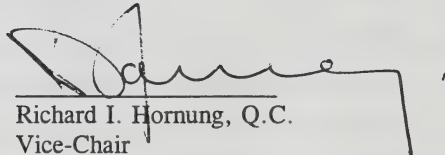
V

The question of the remedy to be provided in this case has been left for further representation and argument to the Board. This was done because Stolp, although filing his section 37 complaint, accepted the \$60,000 cheque, cashed it and utilized the funds.

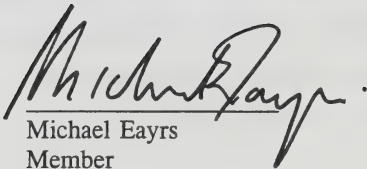
The Board raised a concern that in the event the matter proceeded to arbitration and Stolp was unsuccessful, it may be beyond the jurisdiction of the arbitrator, and indeed even the Board, to then order the return of the \$60,000 in question.

For those reasons, and in an effort to ensure that the Board's order operates fairly with respect to all of the parties, the Board will await further argument and submissions from the parties with regard to what, if anything, should be ordered with respect to the sum of \$60,000 that has already been paid to Stolp.

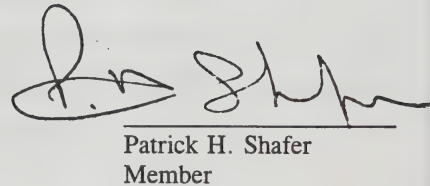
Accordingly, pursuant to section 20 of the Code, the Board will retain jurisdiction to order a remedy with respect to the above matter. The parties shall be given 30 days to file submissions with the Board on the fashioning of an order and direction of the appropriate remedy.



Richard I. Hornung, Q.C.
Vice-Chair



Michael Eayrs
Member



Patrick H. Shafer
Member

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Summary

Greg W. Prichard, *applicant*, and National Automobile, Aerospace, Transportation and General Workers Union of Canada, *bargaining agent*, and Canadian Imperial Bank of Commerce, *employer*.

Board Files: 17934-C
18129-C

CLRB/CCRT Decision no. 1227
May 28, 1998

This matter concerns an application, pursuant to section 38(1) of the Code, for an order revoking bargaining rights held by a certified trade union for a unit of bank branch employees.

The applicant was formerly a branch manager at another of the employer's branches. He is now employed at the branch in question, in a position (Account Manager) that the Board excluded from the bargaining unit following a prior section 18 review of the unit.

The applicant filed his application shortly after having being "added" to the bargaining unit pursuant to an agreement made between the employer and the trade union. The agreement took effect just before commencement of the "open period" for filing a revocation application.

Résumé

Greg W. Prichard, *requérant*, et National Automobile, Aerospace, Transportation and General Workers Union of Canada, *agent de négociation*, et Canadian Imperial Bank of Commerce, *employeur*.

Dossiers du Conseil: 17934-C
18129-C

CLRB/CCRT Décision n° 1227
le 28 mai 1998

La présente affaire porte sur une demande présentée en vertu du paragraphe 38(1) du Code en vue de faire révoquer les droits de négociation détenus par un syndicat accrédité à l'égard d'une unité d'employés d'une succursale d'une banque.

Le requérant était auparavant directeur d'une autre succursale de l'employeur. Il travaille présentement à la succursale en question, où il occupe un poste (directeur des comptes) que le Conseil avait exclu de l'unité de négociation à la suite d'une révision antérieure de l'unité aux termes de l'article 18.

Le requérant a présenté sa demande peu après avoir été «ajouté» à l'unité de négociation par suite d'une entente conclue entre l'employeur et le syndicat. Cette entente a pris effet tout juste avant le commencement de la «période ouverte» pour la présentation d'une demande de révocation.

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In responding to the revocation application, the trade union alleged that: 1) the applicant was a "plant", placed into the unit by the employer to destroy union support, and 2) bargaining unit employees perceived the applicant to be "management" and signatures were obtained through intimidation and coercion. The trade union claimed that in consequence, as a result of employer influence, the application must be dismissed.

The Board initiated its own section 18 review of the bargaining unit in connection with the position of Account Manager, to be determined in conjunction with the revocation application.

The Board determined that inclusion of the applicant in the "all employee" unit is appropriate. The applicant does not perform management functions. The person employed in the position at the time the Board listed it as an exclusion is to remain excluded. She continues to act as relief manager and is employed in a confidential labour relations capacity.

The trade union presented no evidence to suggest that the agreement between it and the employer, to add the applicant to the unit, attracts the unfair labour practice provisions of the Code. Despite the Board's finding that the employer proposed the addition to the unit in the hope that revocation would follow, it is not the Board's role to rescue a party to a bargaining relationship from what may prove to be a bad deal.

En réponse à la demande de révocation, le syndicat a allégué ce qui suit: (1) le requérant était un «agent infiltré», placé par l'employeur dans l'unité afin de miner l'appui pour le syndicat; et (2) les employés dans l'unité de négociation considéraient le requérant comme «membre de la direction», et des signatures avaient été obtenues par intimidation et coercition. Le syndicat a prétendu que par conséquent, en raison de l'influence exercée par l'employeur, la demande devait être rejetée.

Le Conseil a procédé, aux termes de l'article 18, à sa propre révision de l'unité de négociation relativement au poste de directeur des comptes, question qui doit être déterminée conjointement avec la demande de révocation.

Le Conseil a déterminé qu'il y avait lieu d'inclure le requérant dans une unité composée de «tous les employés». Le requérant n'exerce pas des fonctions de gestion. La personne qui occupait ce poste, lorsque le Conseil en avait décidé l'exclusion, restera exclue. Elle continue de remplir les fonctions de directrice de relève et elle occupe un poste de confiance qui traite de relations du travail.

Le syndicat n'a présenté aucune preuve qui pourrait porter à croire que l'entente qu'il avait conclue avec l'employeur, soit d'inclure le requérant dans l'unité de négociation, met en jeu les dispositions relatives aux pratiques de travail déloyales du Code. Bien que le Conseil ait conclu que l'employeur avait proposé l'inclusion du requérant dans l'unité de négociation dans l'espoir que la révocation s'ensuivrait, il ne lui appartient pas de tirer une partie à une relation de négociation de ce qui pourrait se révéler une mauvaise affaire.

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The Board made the following findings concerning employer influence upon the expressed wishes of employees. Even though employees previously perceived the applicant to be "management", by the time he collected signatures in support of his revocation application, they knew he was not a manager for labour relations purposes and that the trade union had agreed to his inclusion in the unit. Arising from a series of employee meetings, the opportunity for full consideration and discussion of the merits of trade union representation presented itself to employees. The Board was unable to conclude based on the evidence presented, that at the time signatures were obtained, employees perceived the applicant to be promising, on behalf of management, a reward for signing in support, or reprisal for failing to do so.

As the applicant provided sufficient signatures to support his claim that he represents a majority of the unit's members, the Board ordered, in accordance with its usual practice, a representation vote.

Le Conseil en est arrivé aux conclusions suivantes en ce qui concerne l'influence de l'employeur sur les désirs exprimés par les employés. Même si les employés avaient eu auparavant l'impression que le requérant était «membre de la direction», lorsqu'il a recueilli des signatures à l'appui de sa demande de révocation, ils savaient qu'il n'était pas un directeur aux fins des relations de travail, et que le syndicat s'était prononcé en faveur de son inclusion dans l'unité. Par suite d'une série de réunions des employés, l'occasion s'est présentée à ces derniers d'examiner à fond la question de la représentation par le syndicat et d'en discuter le pour et le contre. En se fondant sur la preuve présentée, le Conseil n'a pas pu en conclure que les employés, au moment où ces signatures avaient été obtenues, pressentaient que le requérant leur promettait, au nom de la direction, une récompense s'ils signaient pour la demande, ou les menaçait de représailles s'ils s'abstenaient de le faire.

Étant donné que le requérant a fourni suffisamment de signatures à l'appui de sa déclaration, selon laquelle il représentait la majorité des membres de l'unité, le Conseil a ordonné, selon sa pratique habituelle, que l'on procède à un scrutin de représentation.

Reasons for decision

Greg W. Prichard

applicant,

and

National Automobile, Aerospace,
Transportation and General Workers
Union of Canada

bargaining agent,

and

Canadian Imperial Bank of Commerce

employer.

Board Files: 17934-C
18129-C

CLRB/CCRT Decision no. 1227
May 28, 1998.

The Board was composed of Mr. J. Philippe Morneau, Vice-Chair, and Mr. Patrick H. Shafer and Ms. Sarah E. FitzGerald, Members. A hearing was held on July 15-16-17, 1997, at Halifax.

Appearances

For the Employer, Ms. Terry Roane, Q.C. accompanied by Mr. David Dorward, Manager, CIBC Labour Relations.

For the Applicant, Mr. Greg W. Prichard.

For the Bargaining Agent, Ms. Leanne MacMillan, accompanied by Ms. Faye Kinney, Vice-President of the CAW-Canada Local.

These reasons for decision were written by S.E. FitzGerald, Member.

I - The Application

On February 18, 1997, Mr. Greg Prichard (the "Applicant") applied for a revocation order (File 17934, previously numbered 565-0530), pursuant to section 38(1) of the Canada Labour Code (Part I - Industrial Relations):

"38.(1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may ... apply to the Board for an order revoking the certification of that trade union."

Mr. Prichard is employed as an Account Manager at the Antigonish, Nova Scotia, branch of the Canadian Imperial Bank of Commerce ("CIBC" or the "Employer"). He works in connection with the top "personal banking" clients of the branch, hence his specific position title of "Account Manager - Personal Banking". He joined the Antigonish branch in September 1994. Prior to that he was employed as a CIBC Branch Manager in Newfoundland.

The Applicant claims to represent a majority of bargaining unit employees who no longer wish to be represented by the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW-Canada" or the "Union"). CAW-Canada is the certified bargaining agent for the following CIBC unit of approximately fifteen employees:

"all employees [at the Antigonish branch] ... excluding the positions of branch manager, account manager, customer service manager and personal banking manager."

(emphasis added)

The Applicant contends that he became a member of the unit in mid-November 1996, at which time CIBC began deducting trade union dues from his pay. That was just two weeks before the start of the "open period" during which a revocation application may be filed (see section 38(2)(a) of the Code). The CIBC-CAW Canada collective agreement expired February 28, 1997 (the "Collective Agreement").

By way of written submissions, CIBC advised the Board that in October 1996, Mr. Victor Tomiczek, a National Representative of the Union, had agreed to add the branch positions of Account Manager - Personal Banking ("AM-PB") and Account Manager - Small Business ("AM-SB") to the bargaining unit. The collective agreement was not revised at that time and therefore, at the time of Mr. Prichard's application, the recognition clause in Article 1 continued to state:

"The Employer recognizes the trade union as the sole bargaining agent, for all its employees employed [at the Antigonish branch],... excluding the following:

*Branch Manager
Account Manager
Customer Service Manager"*

(emphasis added)

II - Issues

The Union's written submission did not deny the existence of an agreement between CIBC and CAW-Canada to include Account Managers in the unit. Nor had the Union filed a complaint of unfair labour practice in connection with the inclusion of the two Account Managers. However, in responding to Mr. Prichard's application, the Union claims that Mr. Prichard is a "plant", placed in the bargaining unit by management to destroy union support. The Union also claims that bargaining unit members perceived Mr. Prichard as "management", and that the employee signatures that he had collected in support of his application were obtained through coercion and

intimidation, including one-on-one meetings with employees in his office during working hours. CAW-Canada maintains that in consequence, the Board cannot rely upon the signatures to support, within the meaning of section 38(1), Mr. Prichard's claim that he represents a majority of the unit's members.

Having regard to all of the foregoing, and given this Board's decision in 1992 to exclude the position of Account Manager from the unit, the Board scheduled a public hearing with respect to the revocation application. The Board also initiated a section 18 review of the bargaining unit, solely in connection with the position of Account Manager. Parties were advised that the Board would hear and consider the review file (File 18129, previously 530-2652) in conjunction with the revocation application.

Mr. Prichard's application, the responses of the Union and the Employer, and the Board's section 18 review, suggest a number of questions.

- * As an Account Manager, does Mr. Prichard have the status required to file a revocation application?
- * The bargaining unit description in the Board's certification order specifically excludes "Account Manager". Is that determinative of whether the AM-PB and AM-SB positions in question are included or excluded?
- * How should the Board treat the agreement between the Employer and the Union to include those positions in the bargaining unit?
- * Do the incumbents of those positions perform management functions?
- * Is Mr. Prichard a "plant", placed in the unit by management to destroy union support?
- * Is the revocation application free from employer influence?

III - History of the Certification

The Board first granted a certification order for the Antigonish unit in 1986 (File 9557, previously 555-2421). The order named the Union of Bank Employees (Nova Scotia), Local 2107, CLC, as bargaining agent, and established the following bargaining unit:

"all employees [at the Antigonish branch] ... excluding branch manager, assistant manager, administration officer, and casual employees."

In 1992, following a period of reorganisation during which CIBC revised position titles and responsibilities, the trade union applied for a Board review of the unit (File 14355, previously 530-2065). The trade union sought to include "casual" employees and to replace the exclusion of the Assistant Manager and Administration Officer with the inclusion of the newly titled positions of Account Manager, Customer Service Manager and Personal Banking Manager.

The Board determined that the inclusion of employees described as "casual" was appropriate, but decided against including the positions of Account Manager, Customer Service Manager and Personal Banking Manager.

At that time the branch employed only one Account Manager, a Ms. Barbara Landry. A long-term branch employee, she had also been the Assistant Manager prior to the reorganisation. As an Account Manager, she continued to act as relief manager, an unusual arrangement in the CIBC system. For this reason, the Board excluded the position of Account Manager from the "all employee" unit.

To reflect these determinations, the Board issued an amended certification order dated May 14, 1992:

"all employees [at the Antigonish branch] ... excluding the positions of branch manager, account manager, customer service manager, and personal banking manager."

The bargaining unit description has not changed since. In June 1993, following a transfer of jurisdiction from the Union of Bank Employees (Nova Scotia), the Board issued a certification order in CAW-Canada's name (File 15076, previously 580-144).

IV - Issue Analysis

Status to File A Revocation Application

Section 38(1) of the Code allows a revocation application to be filed by "any employee" who claims to represent a majority of bargaining unit members. Section 28 of the Board's 1992 Regulations describes information to be provided by "an employee" who files the application.

Usually the applicant employee is a member of the bargaining unit although a strict reading of the provisions of the Code and Regulations does not demand this. There is a distinction to be drawn between the status to file an application, and one's inclusion for purposes of assessing support for it. A person who files the application must at least be an "employee" of the employer, but rarely might not be a member of the bargaining unit.

Section 3 of the Code defines an "employee":

"'employee' means any person employed by an employer ... but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."

Is Mr. Prichard an "employee"? No evidence or submissions were tendered to suggest that he is employed in a confidential labour relations capacity. The Board directed its examination to the management exclusion.

The wording of the bargaining certificate does not assist us. At the time of the aforementioned 1992 review of the bargaining unit, the then sole Account Manager at Antigonish was excluded on the basis of relief manager duties. The AM-PB position held by Mr. Prichard had not yet been added at the branch.

Persons who perform management functions are excluded from the bargaining unit and denied the right to collective bargaining because of the potential for conflict of interest. As the Board stated in Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91), upheld in Bank of Nova Scotia v. Canada Labour Relations Board, [1978] 2 F.C. 807:

"The basis of the exclusion of certain 'management' persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g. the authority to dismiss or discipline fellow employees). It is for this reason that certain persons are denied collective bargaining rights granted to other employees. ..."

(pages 457; 134; and 536)

We have considered the evidence of job functions of an AM-PB. Mr. Prichard is essentially responsible for developing and maintaining strong relationships with the bank's top "personal banking" clients. He has the discretion to approve loans within a predetermined financial limit. It is his role to obtain as much of the client's business as possible, and to sell a variety of bank products and services to the client.

We note that Mr. Prichard exercises none of the authority associated with management exclusion. He does not hire, fire or exercise any authority with respect to discipline. He is not responsible for the supervision of any employees. In short, he does not have effective control over the employment conditions and economic livelihood of any branch employees. That Mr. Prichard can be said to manage money, in that he exercises his judgment independently within predetermined financial limits, does not equate to a management function for labour relations purposes.

Mr. Prichard is an "employee", entitled to file the application for revocation.

Section 18 Bargaining Unit Review

The evidence of Mr. Nelson's job functions reveals that the Account Manager - Small Business position should be treated, for labour relations purposes, in the same way as the position of Account Manager - Personal Banking. Although an AM-SB's efforts are aimed at developing relationships with small business clients and consequently loan limits within which Mr. Nelson exercises his judgment are higher, the nature of the tasks performed is the same. Mr. Nelson exercises none of the authority associated with a management exclusion. We confirm that Mr. Nelson is also an "employee".

We have considered the Union's argument that the two Account Managers, even though "employees", should not be included in the unit because they do not share a community of interests with other bargaining unit members. See Diversey (Canada) Limited, [1979] 3 Can LRBR 77 (B.C.).

Differences in salary pay grade level and bonus pay calculation between the Account Managers at the time of their inclusion and the rest of the bargaining unit do not make inclusion inappropriate. Accommodation through negotiation of varied levels of experience, skill and responsibility among unit members is an everyday challenge for trade unions. Although part of an Account Manager's responsibility is to develop client relationships in addition to maintaining them and cross-selling bank products and

services, the evidence does not suggest that the main activity of these Account Managers is new business recruitment, such that their style of doing business and the method of remuneration is so necessarily different that inclusion in the unit might prove inappropriate.

We are advised that Account Managers perform the majority of their day's work in the branch. If they wish to vary their working hours in any particular day to attend to client needs, they may do so with permission from their supervisor. Like other bargaining unit employees, the focus of their work is client service. Account Managers are an important component of the team approach urged upon employees by branch management. The addition of those positions to the unit may, in time and with appropriate training, provide an extended career path for other bargaining unit members.

We confirm that the Account Manager positions are appropriate for inclusion in the "all employee" unit.

The Board was also asked to consider the possibility that even if Mr. Prichard's position is appropriate for inclusion, he as the holder of that position should not be included. Such an argument is based on his former experience as a CIBC Branch Manager and the possibility that if he were included, management would be represented on both sides of the bargaining table, thus creating an inherent conflict of interest threatening the viability of the unit. See Diversey (Canada) Limited *supra*.

Although that argument could have proven persuasive at the time of Mr. Prichard's hiring in 1994, he has by now been working for more than three and a half years in a position that does not warrant exclusion on the grounds of management functions. Even if employees once perceived otherwise, for the reasons set out in this decision, it is clear that he is not a manager for labour relations purposes. We do not consider that his exclusion is necessary in order for the unit to respond to the orderly kind of collective bargaining contemplated in the Code.

Board Practice in Revocation Applications

The Board's normal practice in revocation applications is, upon receipt of evidence supporting the claim of majority support referred to in section 38(1), to call for a vote. The Board does so to satisfy itself, pursuant to section 39(1), that a majority of employees in the bargaining unit no longer wish to have the union represent them.

"39.(1) Where, on receipt of an application for an order made under subsection 38(1)... and after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, the Board shall ...

(a) ... revoke the certification of the trade union"

(emphasis added)

As a matter of policy, where the incumbent trade union has challenged the application, the Board will not determine the matter without testing the seeming majority support for the application by way of a representation vote. See Alison Albert et al. (1987), 69 di 110; and 87 CLLC 16,031 (CLRB no. 622), at pages 111; and 14,252.

On occasion, a revocation order is granted without a vote, based on the signature evidence filed in support and on the submissions of the parties. The circumstances must clearly satisfy the Board that the trade union no longer has the support of a majority of the unit's employees. This might be the case where, for example, all unit members have indicated they no longer wish to be represented by the trade union, and the trade union does not object to the application. This is not the situation before us.

It is implicit, when the Board orders a representation vote in connection with a revocation application, that unless specifically commented upon, evidence to support the claim of majority support has been provided and the Board accepts that the signatures provided are both timely and those of the persons they purport to represent.

It makes good labour relations sense that the Board would not normally conduct a vote unless convinced of both the majority nature and reliability of the signature evidence. Announcement of a representation vote (certification or revocation) may result in additional campaigning, lawful or otherwise, by employers, trade unions and employees. Until the vote is cast and counted, the fact that representation is in issue may prove disruptive to the employer's operations and the lives of the employees.

The mere allegation that signatures were obtained during work hours is not normally, in and of itself, cause to reject the revocation application since, as noted above, it is the Board's usual practice to order a vote once satisfied a majority has indicated support. See Steve Baidwan (1985), 62 di 99; and 85 CLLC 16,046 (CLRB no. 526), at pages 109; and 14,305. However, where an allegation of employer influence is made, then despite evidence to support the claim of majority support, the Board will wish to make some form of inquiry before deciding whether to conduct a vote. The application must be free from employer influence. Where alleged, it is important that the Board determine whether any circumstances or actions attributable to the employer influenced the decision of the employees to seek revocation. See Jean-Claude Harrison et al. (1983), 53 di 85; and 4 CLRBR (NS) 258 (CLRB no. 417), at pages 98; and 272; Joseph Szabo and Jaro Jarkovsky (1977), 25 di 345; and [1978] 1 Can LRBR 161 (CLRB no. 103); William E. Blonski (1984), 56 di 222; 8 CLRBR (NS) 111; and 84 CLLC 16,054 (CLRB no. 476); and Mike Schembri et al. (1998), as yet unreported CLRB decision no. 1221.

Should the Board find that employee wishes have been influenced by the employer, the signature evidence will be rejected, and the revocation application will in the normal course of events fail. A vote will not be ordered, as the Board is unlikely to be satisfied that the vote, even though conducted by way of secret ballot, will capture an expression of free will by employees, given that their desire to seek revocation was itself the product of employer influence. More importantly, the Board must not allow a trade union's representation rights to be challenged by a vote, where the signature evidence in support is the product of employer influence. Announcement of a

representation vote can lead to further campaigning, lawful or otherwise. At a time when a trade union's efforts are focused on achieving improved work terms and conditions for employees, the trade union would find itself expending its resources to defend itself, in order to preserve bargaining rights. Were the Board to conduct a vote despite the presence of employer influence, the trade union could be deprived of its bargaining rights unlawfully, the employer's interference with the employees' freedom to choose trade union representation could go unchecked, and the Code's purposes would be undermined.

In Jean-Claude Harrison et al., *supra*, the Board described employer influence in this way:

"The Board has to know if the employees were 'stampeded into (their) decision'. (J. Phillips ...), and whether the actions of the employer resulted in 'restricting the employees' choice of freedom to decertify the bargaining agent' (J. Phillips ...) or whether the action of the employees was done of their own free will without fear, or promise of favour."

(pages 98; and 272)

In short, the Board will ask whether it is satisfied on a balance of probabilities, based on the evidence before it and any inferences that evidence entitles the Board to draw, that the employee decisions to sign in support are free from employer influence. Put another way, have actions or circumstances attributable to the employer influenced the employees' decision to seek revocation?

Evidence Considered in Determining Allegations of Employer Influence

Several people whose testimony might have proven useful did not testify. Given the nature of the Union's allegations and the evidence presented to support such allegations, it is necessary to outline in some detail the circumstances and factual findings that we have considered in drawing our conclusions. We start with the

hiring of the Antigonish AM-PB and AM-SB, and events leading to their inclusion in the unit.

Two witnesses testified on behalf of CIBC: Mr. Joe Griffin, CIBC Antigonish Branch Manager since 1992, and Mr. David Dorward, CIBC's Toronto-based Manager, Labour Relations, since 1993. Mr. Dorward is the Employer representative responsible for negotiating collective agreements and handling grievances at CIBC's unionized branches.

Branch Manager Griffin hired the Applicant for the new position of Account Manager - Personal Banking in September 1994. Branch employees were told that Mr. Prichard, a CIBC Branch Manager in Newfoundland, was "transferring" to take employment at Antigonish. Mr. Prichard was told that his position was excluded from the bargaining unit, but that in light of the Board's 1992 review, it might be included at a future date.

In July 1995, Branch Manager Griffin hired someone for the new position of Account Manager - Small Business. This position was also considered non-union.

Nothing suggests to the Board that the decision to add these two new positions at Antigonish or the choice of persons initially hired to fill them has any bearing upon the issues of this case.

CIBC has three unionized bank branches, comprised of about 50 bargaining unit employees. The size of the Antigonish, Nova Scotia and Powell River, B.C. units is roughly the same -- about 15 employees.

In March 1996, Mr. Dorward, CIBC's Manager, Labour Relations, attended scheduled collective bargaining for the renewal of the Powell River collective agreement. Employees at that branch are represented by a different trade union. Mr. Dorward suggested to that trade union, based upon his review of the job functions of

the AM-PB II employed there, that the position be added to the bargaining unit. The less senior AM-PB I position was already included. Powell River did not employ any AM-SBs.

The trade union agreed. Collective agreement negotiations concluded that same month, in March 1996. In April, Mr. Dorward learned that the agreement had been ratified by the trade union.

Collective bargaining to renew the Antigonish collective agreement took place in a one-day session, on April 18, 1996. Mr. Dorward did not mention including both the AM-PB I and II positions in the unit at Powell River, nor did he suggest including the Antigonish Account Managers to CAW-Canada. The Collective Agreement was entered into that same day, with expiry date of February 28, 1997.

About three months later, in late July 1996, the Antigonish AM-SB gave notice of his departure, effective July 31. In what may be the same or two separate telephone conversations between Branch Manager Griffin and Mr. Dorward, but in any event, prior to Mr. Griffin's hiring of a new AM-SB in late August 1996, Mr. Griffin advised he would be hiring a new AM-SB. Mr. Dorward indicated that the Account Managers had been included at Powell River and suggested Branch Manager Griffin consider that possibility for Antigonish. Mr. Dorward felt it was better that the new AM-SB be hired before CIBC sought inclusion of the Account Managers at Antigonish.

Branch Manager Griffin acted quickly to fill the AM-SB position as he was scheduled to be in Toronto, August 16-19, and on vacation August 19-30. He posted the position "on-line" and telephoned Mr. Emile Thibault, Halifax Manager, Employee Relations, as he normally would. The Halifax office referred the names of two candidates. Mr. Griffin interviewed one of them, Mr. Nelson, by telephone, to verify his commercial lending knowledge. Subsequently, while on vacation, Branch Manager Griffin decided in favour of Mr. Nelson and telephoned him.

Mr. Nelson started work in September. He was advised that the AM-SB position was excluded but, given the Board's 1992 review, future inclusion in the unit was possible.

Mr. Dorward testified that the possibility of including the Antigonish Account Managers did not come to his mind again until October 1996, at which time he finally received a signed copy of the new Powell River collective agreement. As bargaining at Antigonish would soon begin again, he contacted Branch Manager Griffin once more.

Mr. Dorward suggested that inclusion of the Antigonish Account Managers would achieve bargaining unit consistency in unionized branches, in particular, at Antigonish and Powell River. Branch Manager Griffin was not opposed, and agreed that the job functions of Mr. Prichard's AM-PB and Mr. Nelson's AM-SB positions did not warrant exclusion from the unit. He did advise Mr. Dorward that Account Manager Landry should not be included, because of her relief manager work and her strong, known opposition to the union. However, seeing no basis for excluding Mr. Prichard, Branch Manager Griffin did not mention that Mr. Prichard was a former CIBC branch manager or that he thought, having worked with Mr. Prichard for two years, that Mr. Prichard was unlikely to be in favour of union representation.

Following this discussion, Branch Manager Griffin spoke with both Mr. Prichard and Mr. Nelson about possible inclusion in the unit. By this time, Mr. Nelson, the new AM-SB, had been working at Antigonish for about one month.

Mr. Dorward next telephoned CAW-Canada National Representative Victor Tomiczek to propose the additions to the unit. Mr. Tomiczek agreed to the inclusion of Mr. Prichard and Mr. Nelson, and an amount of dues deduction was determined. Revisions to the collective agreement were to be handled as a housekeeping item in the upcoming round of collective bargaining.

National Union Representative Tomiczek did not testify at the Board's hearing. We have no information as to what particular considerations, if any, led the Union to agree to the Employer's proposal at that time.

Dues deductions for the two Account Managers began soon after, in mid-November 1996. By this time, Branch Manager Griffin had spoken with them to confirm their inclusion and discuss its effect upon their pay. We are satisfied from the evidence adduced concerning the annual salary review process and the calculation of bonus payments that the Account Managers would have perceived their inclusion in the unit as negatively impacting upon their pay.

About one month later, some time before Christmas 1996, the Union's Local President (employed at another financial institution in the area) telephoned to advise Ms. Faye Kinney, a member of the Antigonish bargaining unit, of the two new inclusions. Up to that time apparently, no Employer or Union representative, or even the Account Managers themselves, had mentioned the new additions to unit members.

Ms. Kinney testified on behalf of CAW-Canada. She has been employed by CIBC for 23 years and has been a member of the Antigonish unit since its inception in 1986. She provides full-time "personal banking" sales support to Mr. Prichard, although she is not supervised by him. She participated in negotiations for the last two collective agreements. By the time of the Board's hearing, she had become Vice-President of the CAW-Canada Local.

Ms. Kinney testified that she had been surprised to learn in December 1996 of the inclusion of the two Account Managers. She explained that everyone knew Mr. Prichard had been a CIBC Branch Manager before transferring to Antigonish. He was employed at a much higher pay grade level than the Antigonish bargaining unit employees. He appeared to set his own work schedule and, from time to time, substituted as chairperson at staff meetings. Ms. Kinney believed that he was a

manager and therefore should not be included in the unit. Furthermore, she did not see any advantage to him arising from the inclusion. She telephoned National Union Representative Tomiczek. Her testimony concerning this conversation revealed only that she had concluded that not much could be done to change the situation.

The Board is satisfied that to this point, nothing would have suggested to unit members that the AM-PB and AM-SB positions were anything other than non-union positions, as they had always been treated. Moreover, we accept that up to this time, the Account Managers, who were not part of the "all employee" unit, had always been viewed by unit members as part of the management team.

In early January 1997, one-and-a-half months after being added to the unit, Mr. Prichard asked for and obtained from Branch Manager Griffin a telephone number through which to contact a labour board about revocation proceedings. Mr. Griffin testified that other than providing a telephone number, he did not discuss the matter with Mr. Prichard. However, he did convey the news of Mr. Prichard's inquiry to Mr. Emile Thibault, the Halifax Manager, Employee Relations, as well as to the other members of the branch management team -- Ms. Landry and Ms. MacDonald.

Branch Manager Griffin acknowledged in cross-examination that, given such a small bargaining unit and the passage of information among those working at the branch, he has a fair idea who supports the trade union and who does not. The Board infers from the evidence adduced that all members of branch management possessed this knowledge. We digress at this point to note that Ms. MacDonald and Account Manager Landry, the other members of branch management, were not called upon to testify by any party to the proceedings. The Applicant, Mr. Prichard, having status to appear at the Board's public hearing, having cross-examined witnesses for the Union, and having been advised by the Board that he could choose to testify or not, chose not to testify. Mr. Nelson, the newly hired AM-SB, was not called as a witness by any party to the proceedings.

As Ms. Kinney did not know of Mr. Prichard's January 1997 inquiry about revocation, she was surprised when in February 1997, at the first employee meeting held to prepare proposals for upcoming bargaining, Mr. Prichard initiated instead a discussion questioning why employees wanted trade union representation. Ms. Kinney asked Mr. Prichard if he had been included in the unit to "break the union". Mr. Prichard replied that he had asked himself the same question, but that he had not been so instructed and, if that was the intention, it could backfire on the Employer. Nonetheless, Mr. Prichard went on to state his opinion that the employees did not need a union and that they could make more money without one. He made several references to his knowledge based on his experience as a Branch Manager and stated that he did not see the value of a union for such a small unit in a large corporation like CIBC. He explained to the employees that giving up certification did not mean losing their jobs. He assured them that if they worked hard and did a good job, they would have nothing to worry about.

To Ms. Kinney's surprise, the then union shop steward seemed to be agreeing with Mr. Prichard, and by the time the next employee meeting was held in February, had withdrawn from her role as shop steward. Ms. Kinney stepped forward to fill the vacancy.

Around this time, and perhaps as late as February 10, Branch Manager Griffin informed CAW-Canada of the difficulty in finding dates on which all members of the CIBC bargaining team (Griffin, Dorward, Thibault) were available. Earlier attempts to schedule bargaining had failed due to the unavailability of members of the Union bargaining team.

On February 12, the employees met for a third time. National Union Representative Tomiczek attended the meeting. He explained how the Account Managers had come to be included in the unit. Mr. Prichard once again cited reasons to "go non-union". He gave an example of employees at a non-union branch who were paid more for the same work. Mr. Nelson, the AM-SB, also spoke. He noted that if the branch was

non-union, the employees would no longer be restricted to the percentage of bonus pay specified in the collective agreement, nor would employees have to pay union dues.

To her surprise, Ms. Kinney found herself to be the member of the unit advocating on behalf of the union. National Representative Tomiczek observed that the group was obviously divided, and its members should get together as strength comes in numbers.

Ms. Kinney acknowledged in cross-examination that revocation of trade union bargaining rights had been discussed among Antigonish employees from time to time over the years.

On Friday, February 14, 1997, two days after the third employee meeting, Mr. Prichard asked some bargaining unit members to come to his office, one by one. Only the Branch Manager and Account Managers have partitioned offices at the branch. Ms. Gerri Frizzle testified concerning her brief meeting with Mr. Prichard. Ms. Frizzle, a part-time customer service representative, has been employed with CIBC about 13 years in total.

Mr. Prichard told Ms. Frizzle that she already knew his views from the employee meetings. He said that he was collecting signatures for a revocation application and asked for her support. She did not sign. She was however sufficiently bothered by Mr. Prichard's approach and request that she complained to her supervisor, Ms. Lisa MacDonald. Ms. MacDonald is employed in an excluded management position. Ms. MacDonald stated that Mr. Prichard "couldn't do that". However, she did not report back to Ms. Frizzle at any time that she or any other management member had spoken with Mr. Prichard, or even that she had reported the matter to more senior branch management.

By the time Ms. Kinney met with Mr. Prichard on February 14, she knew he was seeking signatures in support of revocation. She was surprised that he seemed to be acting alone rather than by group decision. Two employees (in addition to Ms. Frizzle) had reported to her, having being approached by Mr. Prichard. One had been contacted at home the night before, the other that morning at work. Before meeting with Mr. Prichard, Ms. Kinney sought out the former shop steward to ask if she too had been approached.

Upon entering Mr. Prichard's office, Ms. Kinney told him that he could not discuss union matters during work hours. Mr. Prichard stated briefly that he was going to file a revocation application, that he had given everyone an opportunity to sign, and that he was not asking Ms. Kinney to sign but simply advising her as she was the last one to see him that day and he had already collected enough signatures. From these statements Ms. Kinney understood and believed Mr. Prichard had collected all of his signatures at work that day. She did not sign in support. She contacted the Union's Local President and, later that day during non-working hours, distributed a notice advising the bargaining unit members that they were under no obligation to meet with Mr. Prichard or to sign any agreement he presented to them.

The following Monday, February 17, Ms. Kinney asked Branch Manager Griffin if he knew that Mr. Prichard was asking employees to meet with him in his office to discuss "union matters". She asked if the Union could do the same. Mr. Griffin indicated that he was not aware of such activity and that he would speak with Mr. Prichard.

Mr. Griffin testified that he suspected the activity complained of concerned revocation efforts by Mr. Prichard. However, as it was a busy day for both him and Mr. Prichard, he did not speak with Mr. Prichard immediately. Moreover, he did not advise Ms. Kinney at any time that the matter had been dealt with. In fact, Mr. Griffin did not speak to Mr. Prichard until the following morning, February 18, which was the day Mr. Prichard filed his application. It was some time later that

management member MacDonald reported Ms. Frizzle's earlier complaint to Branch Manager Griffin.

Board Decision Concerning Allegation of Employer Influence

Where employer influence is alleged, it is usually unnecessary and impractical to subject large numbers of employees to questioning at a public hearing about their representation wishes and inappropriate to require that those who do testify reveal whether or not they signed in support.

If the Board finds that circumstances and actions attributable to the employer warrant a conclusion of employer influence, it is of no use to question individual employees about their wishes. Anyone who may have signed out of fear of reprisal, or in the hope of reward from management, is unlikely to be a willing witness against the employer. Regardless, the Board's determination of employer influence must be based on the evidence that is adduced, and any inferences that evidence entitles it to draw.

We do not find the Employer's explanation of the circumstances that led it to propose the inclusion of the Account Managers at the time it did to be complete. The inclusion of the Account Managers and any discussion of pay or other work terms and conditions were not bargained as part of the anticipated, upcoming round of collective bargaining, following which, for the term of the agreement, all employees, including the Account Managers, would have an opportunity to reflect upon inclusion, and assess its consequences. Rather, inclusion was proposed in advance of anticipated bargaining, shortly before commencement of the "open period", thus providing Mr. Prichard, as a new addition to the unit, an opportunity to promptly seek revocation of the Union's bargaining rights. The Employer knew that at the time of his inclusion, Mr. Prichard was unlikely to be in favour of trade union representation. Furthermore, management had no reason to believe that Mr. Nelson would, at the time of his inclusion, be in favour of trade union representation either, or even be

neutral on the question. The message communicated to both Account Managers by management was that inclusion would negatively impact upon their pay.

We do not mean to suggest that employee preference for, or opposition to, trade union representation should determine the appropriateness of inclusion or exclusion. However, the Employer's awareness of the likely wishes of the two Account Managers is significant, given the timing of their addition to such a small unit, and branch management's general sense of which employees favoured or opposed union representation.

We conclude that the Employer proposed the inclusions at the time it did, in the hope that a revocation campaign would result. Although Mr. Prichard did not testify, the evidence that was presented suggests that he and the Employer did not conspire in advance of his inclusion to "break the union". In such circumstance, we do not draw an adverse inference from Mr. Prichard's failure to testify. We accept though, that the Employer hoped for revocation, and predictably one might say, Mr. Prichard rose to meet the challenge. It is open to us to conclude and we do conclude from the evidence presented, including the signed confidential statements of employee support, that the impact of the addition of the two Account Managers, shortly before the time when the Union's representation rights could be challenged, was just enough to tip the scale in this small bargaining unit, which had previously discussed revocation but never acted upon it.

Our conclusions concerning Employer awareness are not, in and of themselves, sufficient to make a finding that supports the trade union's opposition to the revocation application. The role of the Union must also be examined.

National Representative Tomiczek did not testify. Nor did counsel for the Union cross-examine Mr. Dorward, the CIBC Manager, Labour Relations, concerning the circumstances and particulars of the telephone call during which Mr. Tomiczek agreed to the inclusions. The Board has no information suggesting any follow-up by Mr.

Tomiczek with Mr. Dorward or any other member of CIBC management, at any time prior to the revocation application. This is so, even though Mr. Tomiczek attended the third employee meeting in February 1997 at which Mr. Prichard and Mr. Nelson were urging employees to "go non-union". In short, the Union appears not to have taken issue with the inclusion of the Account Managers until Mr. Prichard filed the revocation application.

The Board also finds it odd, given that the Union agreed to the inclusions in October 1996 and that dues deductions for the two Account Managers began in mid-November 1996, that no one from the Union advised bargaining unit members of the inclusions until some time before Christmas 1996. Ms. Kinney's testimony concerning the content of her telephone call to National Union Representative Tomiczek revealed only that she had concluded that nothing could be done about the matter. Nor did her testimony provide any detail of Mr. Tomiczek's explanation to employees at the third employee meeting in February 1997 concerning the inclusion of the Account Managers.

Ultimately, we must decide what the evidence reveals in terms of employee perception. We accept that the bargaining unit members were surprised by the inclusion of those individuals they had previously viewed as management. We are unable to conclude however that employees perceived Mr. Prichard to be a member of management at the time they signed in support of his application. Even though some employees were not happy about the inclusions, by the time Mr. Prichard collected signatures, employees understood that the Account Managers were not management and that their trade union had agreed to the additions to the unit.

Certainly employees perceived that the Employer had manipulated events at Antigoniash in the hope of revocation. In saying so we note that the inclusion of the Account Managers was, for bargaining unit members, sudden. No one had advised them that the issue was under consideration. The inclusions were agreed to shortly after the new AM-SB was hired and took effect shortly before commencement of the

"open period". As the employees would learn, management had proposed the inclusions. Branch management and the Account Managers had known of the additions to the unit for several weeks and, whether required to or not, had apparently chosen not to mention this significant development to the bargaining unit members. At the first employee meeting to prepare bargaining proposals Mr. Prichard initiated instead, discussion questioning trade union representation. It was Ms. Kinney's immediate spoken suspicion that Mr. Prichard had been added to the unit to "break the union". Following that meeting the then shop steward withdrew from her union position. By the time the third employee meeting was held, both Account Managers were providing reasons to "go non-union". Bargaining had not begun as dates suitable to both Employer and Union bargaining teams could not be found.

Does employee perception that the Employer manipulated events in the hope of revocation necessarily lead to a conclusion that employee signatures were the product of employer influence? Having assessed the evidence adduced, we do not find that employees understood Mr. Prichard to be promising, on behalf of management, a reward for revoking the Union's bargaining rights or reprisal for those who failed to sign in support. On their face, the statements made by Mr. Prichard and Mr. Nelson did not cross the lines of permissible salesmanship. Bargaining unit members should be encouraged to try and persuade each other of their views. An employee's decision to support continuation or revocation of a trade union's bargaining rights is an individual one, and certainly does not require the group's general approval. Certainly the context in which those statements were made must be appreciated. However, we conclude that by the time Mr. Prichard collected signatures in support, employees understood he was not a member of management, and to the extent they once saw him in that light, they no longer perceived him to be acting on behalf of management in the sense of being able to promise reward or reprisal.

To the contrary, we find that on a balance of probabilities, as a result of the discussion that occurred at the three employee meetings in February 1997, in addition to whatever other conversations may have occurred among employees around that

time, the opportunity for full consideration of the merits of trade union representation presented itself. Even though employees perceived management had proposed the inclusions in order to dilute union support and in the hope that revocation would occur, employees knew they were faced with an important decision.

We considered the possibility of intimidation or coercion, whether intended by Mr. Prichard or not, when, following the three employee meetings, he approached members of the unit one-on-one to seek support for his application. This includes requests of some employees that they meet with him in his office. However, given the foregoing conclusions concerning employee perception, and the absence of any direct evidence suggesting intimidation or coercion, the circumstances alone do not lead us to infer that employees were intimidated and coerced into providing signatures. We say this even though certain bargaining unit members alerted Ms. Kinney, the new shop steward, to the fact that they had been approached by Mr. Prichard, and others complained to management.

Lastly, with respect to employer influence, having regard to the dates of the signed confidential employee statements and the testimony of witnesses, we are not satisfied that employees who signed in support could have been influenced by a belief that branch management knew of and was turning a blind eye to the fact that Mr. Prichard was holding meetings with employees in his office on February 14. That is, the evidence does not suggest that any employee's decision to sign could have been influenced by a sudden awareness not only of management's knowledge of, but active support for, Mr. Prichard's efforts, such that the employee would be induced to sign in the hope of reward or fear of reprisal. Similarly, because of the timing of events, we are also unable to conclude that what we do find to be the clear failure of management members MacDonald and Griffin to respond to employee complaints could have influenced the decision of any employee who signed in support of Mr. Prichard's application.

Effect of Employer-Union Agreement to Include Account Managers

Having determined that the signature evidence will not be rejected on the basis of employer influence, we must decide if the wishes of Mr. Prichard and Mr. Nelson are to be included in assessing, as required by section 38(1) of the Code, whether Mr. Prichard provided evidence to support his claim that he represents a majority of the unit's members. This requires in turn that the Board determine whether it will give effect to the agreement between the Union and the Employer to add the Account Managers to the unit at the time they did.. Is there any reason why the Board would not give effect to such an agreement?

In the federal labour relations jurisdiction, a Board certification order is not extinguished upon conclusion of a first collective agreement. The Board encourages parties to make section 18 review applications, jointly where applicable, to ensure that the Board maintains certification orders that reflect bargaining reality. Nonetheless, it is in the community's interest that the Board give effect where practical to agreements struck by parties to a bargaining relationship. This is particularly so where an "inclusion" is in issue, given the Code's preference. Certainly, inclusion of a position warranting exclusion on the basis of management functions will not be accepted by the Board. However, barring Board refusal to ratify the inclusion of such persons who are not "employees" within the meaning of the Code, it is not the Board's role to rescue a party from what may prove to be a bad deal (see Ghislaïne Otis et al. (1987), 72 di 7; 19 CLRBR (NS) 16; and 88 CLLC 16,004 (CLRB no. 657)).

The Antigoniish bargaining unit is an "all employee" bargaining unit, which the parties to the bargaining relationship agreed at a particular point in time should include the two Account Managers in question. Our review of the job functions of the Account Managers, *supra*, confirms that the inclusions are appropriate. The Union did not provide any evidence to suggest that the deal struck between the Employer and the Union attracts the attention of the unfair labour practice provisions of the Canada

Labour Code. In such circumstances, the Board will not step in to set aside the agreement on the basis that Mr. Prichard is a "plant", even though we accept as fact that the Employer proposed the inclusions to the Union, at the time it did, in the hope that a revocation effort would follow.

In consequence, we give effect to the agreement between the Union and the Employer to include the Account Managers in the bargaining unit at the time they did.

In response to the Union's argument based upon Ghislaine Otis et al., *supra*, we find that the ability of Antigonish employees to know with certainty the size of the unit for purposes of revocation is not in issue here. The bargaining employees knew the two Account Managers had been added to the unit by agreement between CIBC and CAW-Canada, and were proceeding on that basis (some more unhappily than others), even though the recognition clause of the collective agreement had not yet been amended.

In conclusion, any wishes expressed by Mr. Prichard and Mr. Nelson are to be considered in assessing support for the application.

We find that Mr. Prichard has provided evidence to support his claim that he represents a majority of the unit's members.

V - Representation Vote

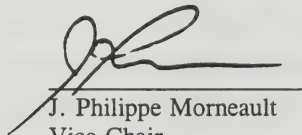
We believe that a representation vote taken in the context of this revocation application, once employees have been provided an opportunity to review these Reasons for Decision, will allow the employees to freely express their wishes concerning continued representation by their trade union, CAW-Canada, or no union.

The Employer shall provide a copy of these Reasons for Decision to all bargaining unit members and confirm to the Board the date by which all bargaining unit members have received a copy. The Board orders that a representation vote, taken pursuant to

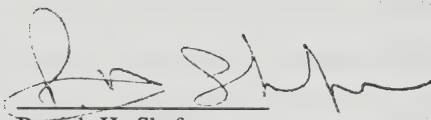
section 39(1) of the Code, be promptly scheduled and conducted following such notification. Employees eligible to cast a ballot are those employees employed by the Employer on February 18, 1997, including Mr. Prichard and Mr. Nelson, and who remain so employed on the day of the vote.

VI - Amended Bargaining Unit Description

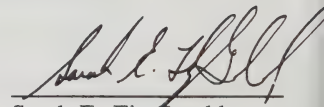
Arising from its section 18 review, the Board amends the bargaining unit description to delete the reference to the Account Manager position as an exclusion. From this it will be understood that the Account Managers are part of the "all employee" unit. Account Manager Landry remains excluded however because of her relief manager duties and, as the testimony of Mr. Dorward revealed, because of her employment in a confidential labour relations capacity.



J. Philippe Morneault
Vice-Chair



Patrick H. Shafer
Member



Sarah E. FitzGerald
Member

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Summary

Sylvie Dionne and Nathalie Voyer, complainants, Confederation of National Trade Unions, union, and Conseil de la Nation huronne-Wendat, respondent.

Board Files:

18300 (745-5787)

18301 (745-5788)

CLRB/CCRT Decision no. 1228
June 4, 1998

Résumé

Sylvie Dionne et Nathalie Voyer, plaignantes, Confédération des syndicats nationaux, syndicat, et Conseil de la Nation huronne-Wendat, intimé.

Dossiers du Conseil:

18300 (745-5787)

18301 (745-5788)

CLRB/CCRT Décision n° 1228
le 4 juin 1998

The complainants alleged that the Huron Nation Band had violated section 94(3)(a)(i) of the Code by terminating their employment as teachers because of their union activities. The employer denied that the complainants were dismissed. It maintained that their contracts ended at the end of the academic year and, in accordance with the Band's policy of giving priority to Aboriginals, it hired two teachers who were Band members to replace them.

Les plaignantes ont allégué que la bande de la Nation huronne avait enfreint le sous-alinéa 94(3)a(i) du Code en mettant fin à leur emploi comme enseignantes en raison de leurs activités syndicales. L'employeur a nié que les plaignantes aient été congédiées. Il a prétendu que leurs contrats se terminaient à la fin de l'année scolaire et que, conformément à la politique de la bande de donner la priorité aux Autochtones, il avait embauché deux enseignants qui étaient membres de la bande pour les remplacer.



Although the reasons invoked for not renewing the complainants' contracts appear to be sufficiently reasonable, a non-aboriginal teacher had never been displaced in order to make place for a Band member.

The Board reviewed the conduct of the employer in the context of the organizing campaign and was not satisfied that its conduct was not motivated in part by anti-union animus. Accordingly, the Board allowed the complaints.

Bien que les motifs invoqués par l'employeur pour expliquer le non-renouvellement des contrats des plaignantes semblent suffisamment raisonnables, un enseignant non autochtone n'a jamais été chassé pour faire place à un membre de la bande.

Le Conseil a examiné la conduite de l'employeur dans le contexte de la campagne de syndicalisation et n'est pas convaincu que cette conduite n'était pas motivée, ne serait-ce qu'en partie, par un sentiment antisyndical. Par conséquent, le Conseil a accueilli les plaintes.

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Reasons for decision

Ms. Sylvie Dionne and
Ms. Nathalie Voyer,

complainants,

Confederation of National Trade Unions,

union,

and

Conseil de la Nation huronne-Wendat,

respondent.

Board Files: 18300 (745-5787)
18301 (745-5788)

CLRB/CCRT Decision no. 1228
June 4, 1998

The Board was composed of Ms. Suzanne Handman and Mr. Jean L. Guilbeault, Q.C., Vice-Chairs, and Mr. David Gourdeau, Member.

Appearances

Mr. Jean Laroche, for Ms. Sylvie Dionne and Ms. Nathalie Voyer; and
Mr. Laval Dallaire, for the Conseil de la Nation huronne-Wendat (the "Huron-Wendat Nation");

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

I

Ms. Nathalie Voyer and Ms. Sylvie Dionne filed unfair labour practice complaints alleging that the Huron Nation Band had violated section 94(3)(a)(i) of the Code by

terminating their employment as teachers because of their union activities. The employer denies that the complainants were dismissed. It maintains that their contracts ended at the end of the academic year and, in accordance with the Band's policy of giving priority in employment to Aboriginals, it hired two teachers who were Band members to replace them.

II

Ms. Nathalie Voyer was hired by the Band as a part-time teacher in September 1989. She subsequently obtained a full-time position as a third grade teacher in August 1990 and, having ranked first amongst the applicants, was immediately promoted to teach the sixth grade. The position was fixed from August 27, 1990 until June 30, 1991. At the end of the academic year, she was advised by the Director of Educational and Cultural Affairs, Mr. Roger Vincent, that her employment would continue for the coming year, and thereafter she received a letter informing her that her contract was renewed. Although initially concerned about the continuity of her employment, she ceased asking about her contract renewal given that Mr. Vincent told her that she was performing well and the annual letter was simply a formality.

On July 29, 1997, Mr. Vincent advised Ms. Voyer that the teaching position she held would not be offered to her for the next academic year; it would be filled by a member of the Huron-Wendat Nation. Ms. Voyer told the Board that she had no idea she would be dismissed. On the contrary, she had every reason to believe that her employment with the Band would continue in the 1997-98 academic year. Ms. Voyer pointed to the fact that - as in previous years - she kept her keys to the school at the end of the year and had not been provided with termination of employment statements. She was listed in the school agenda as a teacher for the 1997-98 school year. Moreover, in response to her request for a leave of absence from August 26, 1997 until February 13, 1998, Mr. Vincent made no reference to the termination of her employment but advised her on July 2, 1997 that it was only possible to take leave for a full academic year and not a partial year.

When questioned about the Band's hiring policy, Ms. Voyer claimed that preferential hiring of Band members applied only to newly created positions. In fact, the issue of placing several aboriginal teachers had been raised at an educational meeting in June 1996, since the teachers were aware that three Band members would be receiving their teaching degrees in the coming year. Mr. Vincent reassured the teaching staff that positions occupied by non-Aboriginals would not be affected; Aboriginals would be awarded new positions.

Ms. Voyer testified that this was not the first time that Band members had completed their studies. However, in the past, no teaching position had ever been vacated in order to give it to an Aboriginal. She believed that her employment was terminated because of her union activities.

III

Ms. Sylvie Dionne's complaint is similar to that of Ms. Voyer. Ms. Dionne was hired by the Band in 1990 as a third grade teacher and held that position until her employment was terminated on July 29, 1997. Ms. Dionne testified that her contract was renewed automatically each year. As in Ms. Voyer's case, after her first year of teaching, the Band ceased giving her a termination of employment statement; she kept her keys to the school at the end of every year; and her name was listed in the school agenda for the 1997-98 academic year.

According to Ms. Dionne, the question of replacing her had never been raised. At the end of the 1997 academic year, she had been offered computer training along with others. In addition, an exchange of correspondence between her and Mr. Vincent concerning her annual evaluation of June 1997 contained nothing to indicate that her employment would be terminated.

IV

Mr. François Gagnon, a CNTU organizer, was first contacted by employees of the Huron Nation in March 1996 and steps were taken to begin organizing. However, since a committee of employees was negotiating an agreement akin to a collective agreement in the spring of 1996, the organizational campaign was put on hold. An agreement was concluded in August 1996 but following the election of a new Band council in the autumn, the agreement was put into question. This led to a renewal of the organizational campaign and on June 13, 1997, a certification application was filed for a group of employees other than the teachers. According to Mr. Gagnon, given the rumours, the Band council had suspicions that organizing was taking place and was not completely taken by surprise by the certification application.

The organizational drive continued and a meeting was held with teachers where both complainants signed membership cards. It was decided to solicit further membership among this group of employees and one of the complainants became involved in organizing. On July 8, 1997, the union submitted a second certification application covering the teachers.

In response to the first application, the Grand Chief told Mr. Gagnon that matters would not end there. He then issued a notice advising the Band population that given budgetary constraints, he considered it deplorable for the Band council to be required to put necessary resources into future negotiations. Subsequently, the Grand Chief displayed his displeasure during a television interview. Mr. Richard Picard, Director of Health and Social Services, contended that the discontent expressed by the Grand Chief was related to the fact that the union had addressed the population directly rather than first obtaining the Band's permission or asking that it distribute the information on behalf of the union, in accordance with the practice of aboriginal communities. Mr. Gagnon, however, disputed this explanation, claiming that in the tone of voice and statements made, the Grand Chief had clearly denounced the unionization of the Band's employees.

Mr. Gagnon listed other elements that he considered reflected anti-union animus on the part of the employer. In addition to the public denunciations, he pointed to the Grand Chief's negative reactions to the certification applications, his stated intent to do something about them, the meeting of employees called by the Grand Chief on July 15, 1997 regarding their unionization, the dismissals that followed and the numerous contestations of the certification applications.

V

The Band council passed a resolution in 1996 and again in May 1997 adopting its hiring policy which gave preference to members of the Huron-Wendat Nation. The principles set out in the "Policy of Human Resource Management" state:

"2. Purpose

The purpose of this policy is to establish the rules governing the filling of vacancies. It has two (2) objectives:

- *to ensure that vacancies are filled by the best available candidates;*
- *to ensure that the process is fair and equitable, by giving all candidates an equal opportunity to demonstrate their skills.*

3. Principles

The following principles have guided the development of this policy:

...

- *the members of the Huron-Wendat Nation are given hiring priority;*

...

- *all vacancies must be filled by means of a competition open to the Huron-Wendat Nation, after the lay-off list has been checked; this*

*step must be taken and completed before the competition is posted;
... "*

(translation)

This preferential hiring policy was put into place to meet the Band's goals of autonomy and self-determination. While this policy was first set out in writing in 1996, both Mr. Vincent, Director of Educational and Cultural Affairs, and Mr. Richard Picard, Director of Health and Social Services, stated that the principle of hiring Band members had always existed. With this purpose in mind, as well as for economic reasons, all contracts after 1990 were concluded for a set period of time.

According to Mr. Vincent, teaching contracts end on June 30, unless notice to the contrary is provided. In contrast to Ms. Voyer's claim, he maintained that notice as to the renewal of a contract is not a mere formality. Mr. Richard Picard, however, admitted that - with the exception of projects having specific financing - he did not recall a case where a contract for a determinate period of time had not been renewed.

Mr. Vincent testified that what had promoted the Band Council to terminate the complainants' contracts was the fact that three members of the Huron-Wendat Nation, namely Annie Gros Louis, Guylaine Gros Louis and Martine Gros Louis, had completed their studies and two of them had written to the Grand Chief on July 10, 1997, requesting teaching positions at the Band's school. They were advised on July 29, 1997 that while the Band favoured the hiring of its members, it wished to assure the legality of its human resource policy before putting this policy into effect. On the same date, Mr. Vincent advised Ms. Voyer and Ms. Dionne that their teaching positions for the coming academic year would be filled by Band members.

Other Aboriginals had previously obtained teaching degrees and had been hired by the Band as teachers. However, in the past, Aboriginals were hired when there were vacant positions. Mr. Vincent admitted that this was the first time that there had been

such a change in employment, but said that this was also the first time that three Hurons had obtained their degrees in the same year.

Mr. Vincent testified that the Band had nothing to reproach the two complainants. Their contracts were for a set period of time and had come to an end as of June 30. Since they had the least seniority, the Band decided not to renew their contracts in July 1997 and to provide their positions to aboriginal teachers. This was the sole reason; it did not result from anti-union animus.

VI

The case law with respect to complaints alleging a violation of section 94(3) of the Code is well established (see Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82); Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134); Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600); Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842); and National Pagette (1991), 85 di 1 (CLRB no. 862)). The Code establishes the right of employees to opt for collective bargaining and provides job protection for those involved in the formation of a union at their workplace, whether it be as a union organizer or a union supporter.

In establishing that the discharge, lay-off or other action taken against employees resulted from their union activity, section 98(4) creates a presumption in favour of a complainant, reversing the burden of proof. In order to refute this presumption, the employer must show that the reason for its disciplinary or administrative action was in no way motivated by anti-union animus.

The Board does not attempt to determine whether the decision made by the employer is fair or reasonable. Rather the Board takes care to ensure that the employer does not use an outwardly legitimate reason as a pretext to rid itself of an employee because of union activity. Consequently, if an employer in reaching its decision to terminate

or lay-off an employee is in any way influenced by the fact that the employee has exercised a right under the Code or intends to do so, then its actions will be in violation of the Code. As the Board has consistently stated, even if anti-union motives are only a proximate cause, the employer will be found to have committed an unfair labour practice. These principles are set out in National Pagette, *supra*, as follows:

"... In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions prescribed in section 184(3)(a) (now 94(3)(a)) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code...'"

(pages 9-10)

VII

An employer has the right not to renew a term contract or to terminate a contract of an indeterminate length provided that the reasons are not contrary to section 94(3) of the Code.

In this instance, the employer, in evidence and in argument, contended that the sole reason for not renewing the complainants' contracts was to provide employment for Band members. No anti-union animus was involved in this decision; the Band was simply implementing its preferential hiring policy which provides that, in filing positions, priority would be given to members of the Huron-Wendat Nation.

The facts, however, reveal that the objectives of positive discrimination were not new at the Band. A preferential hiring policy, although formally adopted by the Band by resolution in 1996 and 1997, had existed for years prior to that time as an unwritten policy and notwithstanding this policy, the complainants were hired in 1989 and 1990.

The facts also show that this was not the first time that Band members had obtained teaching degrees. However, despite having instituted fixed term contracts after 1990 and despite the availability of aboriginal teachers, the Band had renewed the complainant's contracts.

More importantly, in the past, notwithstanding the Band's stated preference for the hiring of Aboriginals, the uncontradicted evidence established that a non-aboriginal teacher had never been displaced in order to make place for a Band member. This was the first time contracts had been terminated in order to provide employment to Aboriginals. Whether or not the Band's hiring policy in the present case has as its purpose the displacement of non-aboriginal teachers, this clearly has been the effect.

The union had filed one certification application in June 1997 and then formally began organizing another group of employees including the teachers in the latter part of June. Following an initial meeting with this group, attended by the complainants who joined the union, the campaign continued with one of the complainants becoming an organizer. Although not conclusive in itself, it seems most plausible to us that when these initiatives were undertaken, news of this organizing campaign leaked out. The campaign proceeded quickly and the certification application with respect to this group was filed on July 8, 1997. On July 15, 1997, the Band employees were called to a meeting with the Grand Chief at which their unionization was discussed and, shortly thereafter, the complainants were told their services would no longer be required.

It should be recalled that during the 1996 school year, management was well aware that there would be three Band members who would be completing their studies as teachers the following year. Despite this knowledge, neither Ms. Voyer nor

Ms. Dionne were advised that their positions, which had been renewed annually, were in jeopardy. On the contrary, at an educational meeting in June 1996, when the issue of the placement of the new aboriginal graduates was raised, the teachers were reassured by Mr. Vincent that non-Aboriginals would not be replaced by Aboriginals. Moreover, in correspondence with both teachers shortly before their dismissal, Mr. Vincent made no mention to either of them that their contract would not be renewed. In light of the employer's claim that contracts terminate on June 30, had the Band intended to replace the complainants with Band members, it would in all likelihood have done so prior to the end of June 1997. The only new element which came into play after that date was the filing of the certification application.

The employer provided the Board with letters from two Band members seeking employment to substantiate its position. However, while the Band told these members that before implementing its policy of preferential hiring, it wished to first verify its legality, it nevertheless terminated the complainants' employment on the same date without obtaining the verification it sought.

Although the employer's reasons for not renewing the complainants' contracts appear to be sufficiently reasonable, these reasons must be considered in light of the employer's conduct in the context of the union activity. Any alleged improper employer action that coincides with union activity will be closely scrutinized by the Board. As the Board stated in Gardewine and Sons Limited (1981), 45 di 124; and 81 CLLC 16,135 (CLRB no. 328), in such cases, employers must not only come before the Board with "clean hands", they must be "squeaky clean".

After considering all the evidence, the Board must decide whether the employer has met the burden of proof imposed on it by the Code. Where the Board is unable to decide which version prevails - that of the employer or that of the complainant - the case of the employer, being the party on which the onus rests, will not succeed. In this regard the Board, in Echo Bay Mines Ltd. (1996), 102 di 91 (CLRB no. 1179), stated:

"Weighing all the evidence, the Board must decide at the conclusion of the case, whether in the circumstances, the employer met the burden imposed upon it. Where the employer is unable, on balance, to prove that anti-union animus had no role to play in its impugned decision, it will not have met the onus imposed upon it by section 98(4) of the Code. This is so, even if the Board is simply unable to decide, as here, which version - the union's or the employer's - to accept. In such a case, the argument of the employer, being the party with whom the burden of proof rests, must fail. ..."

(page 112)

The reason provided by the employer for terminating the employment of the complainants must be considered in light of the Grand Chief's denunciation of the unionization of the Band's employees, which undoubtedly would be understood by the employees that the Band council took a dim view of unionization, the involvement of the complainants in the organization campaign, the meeting held by the Grand Chief with the Band employees at which their unionization was discussed, the Band's failure to verify the legality of its preferential hiring policy despite its stated intention to do so, the timing of its decision to terminate the employment of the complainants and the uncharacteristic nature of its decision.

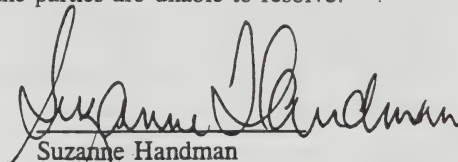
After considering all the evidence, it is as possible that the employer's decision was motivated by anti-union animus as it is possible that its decision was not so motivated. However, the employer has the burden of proof and must convince us that anti-union animus played no role whatsoever in its decision to terminate the complainants' employment. Given that we are not satisfied that the employer's conduct was not motivated in part by anti-union animus, it did not discharge its burden of proof and therefore its case must fail (see Echo Bay Mines Ltd., supra, and Carbec Inc. (1985), 62 di 127 (CLRB no. 528)).


Accordingly, the complaints of Ms. Voyer and Ms. Dionne are allowed.

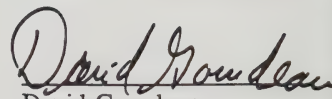
The Board, pursuant to section 99 of the Code, hereby orders the employer to:

1. cease and desist from interfering with the formation and administration of the union;
2. immediately reinstate Ms. Voyer and Ms. Dionne in the same teaching positions they previously held at the Band;
3. pay Ms. Voyer and Ms. Dionne forthwith compensation for lost wages and benefits equivalent to that which each complainant would have earned between the date of the termination of employment and the date of reinstatement, less what they earned elsewhere during this period of time.

The Board appoints Mr. Jean Gosselin, Senior Labour Relations Officer, to assist the parties in implementing the above order and retains jurisdiction to deal with any matter in this regard that the parties are unable to resolve.


Suzanne Handman
Vice-Chair


Jean L. Guilbeault, Q.C.
Vice-Chair


David Gourdeau
Member

information

Le contenu
Publication

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Summary

Rosaire Dufour et al., *complainants*, Transport Drivers, Warehousemen and General Workers' Union, Teamsters Quebec, Local 106, (Q.F.L.), *respondent*, Overland Express (Division TNT Canada Inc.) *employer*, and Inter-City Truck Lines (Canada) Inc., *interested party*.

Board Files: 16880-C (745-5148)
17102-C (745-5230)

CCRT/CLRB Decision no. 1229
June 23, 1998

This case involves unfair labour practices in which the complainants allege that the Transport Drivers, Warehousemen and General Workers' Union, Teamsters Quebec, Local 106 (Q.F.L.), contravened section 37.

The complainants argue that the union withdrew their seniority grievances filed following their transfer from Inter-City Truck Lines (Canada) Inc. to Overland Express (Division TNT Canada Inc.), in contravention of their rights stipulated in the collective agreement, i.e. that seniority lists are to be dovetail following a sale of business. The union submitted that it had complied with the requirements of section 37.

Résumé

Rosaire Dufour et autres, *plaignants*, Union des chauffeurs de camions, hommes d'entrepôt et autres ouvriers, Teamsters Québec, Local 106 (F.T.Q.), *intimée*, Overland Express (Division de TNT Canada Inc.), *employeur*, et Camionnage Inter-City (Canada) Inc., *partie intéressée*.

Dossiers du Conseil: 16880-C (745-5148)
17102-C (745-5230)

CCRT/CLRB Décision n° 1229
le 23 juin 1998

Il s'agit de plaintes de pratiques déloyales dans lesquelles les plaignants allèguent que l'Union des chauffeurs de camions, hommes d'entrepôt, et autres ouvriers, Teamsters Québec, Local 106 (F.T.Q.), a violé l'article 37.

Les plaignants prétendent que le syndicat a retiré les griefs portant sur leur ancienneté, par suite de leur transfert de camionnage Inter-City (Canada) Inc. à Overland Express (Division de TNT Canada Inc.), au mépris de leurs droits prévus à la convention collective, qui prévoit l'intégration des listes d'ancienneté lors d'une vente d'entreprise. Le syndicat maintient qu'il s'est conformé aux exigences de l'article 37.

In April 1993, Inter-City announced that it was ceasing operations and selling its customer list to Overland, effective May 1, 1993. On April 21, 1993, union representatives met with Overland's representatives and agreed that Overland would recognize the seniority of Inter-City's former drivers for vacation purposes only.

The complainants filed two grievances order to dovetail their seniority, on May 5, 1993 and May 18, 1993. On September 16, 1993, Overland's shop foreman filed a grievance requesting that the complainants' seniority be entailed. The union agreed to proceed with the grievance and attached it to the complainants' two grievances, but did not so inform the complainants.

A common hearing on the grievances was scheduled for June 16, 1994. However, the union requested a postponement, stating that, pursuant to section 44 of the Code, they would first hear an application seeking to recognize a sale of business. The application was subsequently prepared and filed on August 26, 1994, following pressure from the complainants. The complainants approved the draft application, but it was amended on the basis of comments made by union representatives. The evidence showed that the union did not deem it necessary to inform the complainants of the amendments to the application. The hearing on the application took place on April 19, 1995. The union requested that the hearing be suspended following Overland's admission

Au mois d'avril 1993, Inter-City a annoncé la cessation pour le 1^{er} mai 1993 de ses activités et la vente de sa liste de clients à Overland. Le 21 avril 1993, des représentants du syndicat ont rencontré des représentants d'Overland et ont convenu que l'ancienneté des anciens chauffeurs d'Inter-City ne serait pas reconnue chez Overland, sauf pour fins de vacances.

Les plaignants déposent deux griefs respectivement les 5 mai et 18 mai 1993 réclamant l'intégration de leur ancienneté. Le 16 septembre 1993, le capitaine d'atelier d'Overland dépose un grief demandant au contraire que l'ancienneté des plaignants ne soit pas reconnue. Le syndicat a accepté d'aller de l'avant avec ce grief et le joint aux deux griefs des plaignants, sans toutefois en informer ces derniers.

Une audience commune de tous ces griefs était prévue pour le 16 juin 1994; cependant, le syndicat a fait une demande de remise au motif qu'il y avait lieu de déposer une demande selon l'article 44 du Code, et ce, afin de faire reconnaître une vente d'entreprise. Par la suite, cette demande a effectivement été préparée et déposée le 26 août 1994 suite à des pressions effectuées par les plaignants. Les plaignants ont approuvé un projet de demande, mais celle-ci a été modifiée suite aux commentaires des représentants du syndicat. La preuve a fait ressortir que le syndicat n'avait pas cru bon d'aviser les plaignants des changements apportés à cette demande. Le 19 avril 1995, l'audience de cette demande fut suspendue suite à l'admission d'Overland que le transfert de la liste des clients constituait

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that the transfer of the customer list constituted a sale of business within the meaning of section 44. On April 26, 1995, the union's Executive Committee held a special meeting during which it decided to withdraw the section 44 application and to reject the grievances, and a resolution to that effect was adopted.

The Board finds that the decisions made by the union's Executive Committee on April 26, 1995 are arbitrary and in bad faith, in contravention of section 37 of the Code, and constitute a serious breach of the duty of fair representation to which the complainants were entitled.

The Board therefore orders the union to reinstate the complainants' grievances and refer them to arbitration, and to pay all legal costs and reasonable expenses related to the hearing as well as all legal costs and reasonable expenses related to the handling of the grievances, and to pay any amounts Overland may be ordered by the arbitrator to pay to the complainants in the event that the arbitrator upheld the complainants' grievances.

liste des clients constituait une vente d'entreprise au sens de l'article 44. Le 26 avril 1995, le comité exécutif du syndicat a tenu une assemblée spéciale au cours de laquelle il fut résolu de se désister de la demande en vertu de l'article 44 et de rejeter les griefs.

Le Conseil en arrive à la conclusion que les décisions prises le 26 avril 1995 par le comité exécutif du syndicat sont des décisions entachées de mauvaise foi et d'arbitraire en violation de l'article 37 du Code et constituent un manquement sérieux au devoir de représentation juste que le syndicat doit aux plaignants.

Le Conseil ordonne donc au syndicat de faire revivre les griefs des plaignants et de les envoyer à l'arbitrage, ordonne le paiement intégral par le syndicat des frais juridiques et dépenses raisonnables liées à la présente audience ainsi que le paiement intégral des frais juridiques et dépenses raisonnables liés au traitement des griefs. Dans l'éventualité où l'arbitre ferait droit aux griefs des plaignants et condamnerait Overland à payer quelque somme d'argent aux plaignants, ces sommes seront à la charge du syndicat.

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Travail

Reasons for Decision

Rosaire Dufour et al.,

complainants,

and

Transport Drivers, Warehousemen and General
Workers' Union, Teamsters Quebec, Local 106
(Q.F.L.),

respondent,

Overland Express
(Division TNT Canada Inc.),

employer,

Inter-City Truck Lines (Canada) Inc.,

interested party.

Board Files: 16880-C (745-5148)
17102-C (745-5230)

CCRT/CLRB Decision no. 1229
June 23, 1998

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and Mr. David Gourdeau and Ms. Roza Aronovitch, Members. Hearings were held in Montréal on September 3-5, 1996 and January 13-17 and 21-24, 1997.

Appearances

Mr. John T. Keenan, assisted by Mr. Donald Carrier, for the complainants;

Mr. Daniel Carrier, assisted by Mr. Jean-Guy Lévesque, President of Local 106 (Teamsters Quebec), for the respondent;

Ms. Louise Patry, for the employer and the interested party.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and by Mr. David Gourdeau, Member.

I

Mr. Rosaire Dufour and 17 of his co-workers filed two complaints alleging that the Transport Drivers, Warehousemen and General Workers' Union, Teamsters Quebec, Local 106 (Local 106 and/or Teamsters), had breached its duty of fair representation as set out in section 37 of the Code. The two complaints are similar in all respects, the second having been filed as a result of events subsequent to the first complaint. For this reason, the complaints, dated August 9, 1995 and November 29, 1995 respectively, will be dealt with simultaneously and a single decision will be rendered.

Specifically, the complainants alleged that Local 106 had withdrawn their seniority grievances filed following their transfer from Inter-City Truck Lines (Canada) Inc. (Inter-City) to Overland Express (Division TNT Canada Inc.) (Overland) in contravention of their rights stipulated in the collective agreement and in particular Article 10.3.

According to the complainants, Article 10.3 of the relevant collective agreement stipulates that seniority lists will be dovetailed following the acquisition of a business. This article of the Overland collective agreement reads as follows:

"10.3 a) In accordance with the Labour Code, if a merger of employers occurs or if an employer acquires by way of purchases the operation rights of another employer or company, all employees affected by said transaction will be dovetailed, taking into account their respective qualifications and seniority. Should the new employer created by the merger or the purchaser not require all of the employees after the merger, lay-offs will commence based on the new seniority list.

b) Laid-off employees will retain their seniority in accordance with clause 16.7e) of this collective agreement."

(translation)

The relevant section of the Inter-City collective agreement reads as follows:

"10.3 a) If the company acquires by way of purchases or in any other manner the business or operation rights of any other company and such operations are merged, the seniority of all active employees will be dovetailed including those employees who are off work due to sickness, injury or authorized leave. If the company acquiring the business or operation rights does not require all the employees after the merger, lay-offs will commence at the bottom of the dovetailed active seniority list, and such employees will remain on the active seniority list for the purpose of recalls.

b) In the event, any of the companies affected by the merger have laid off employees prior to the merger, the seniority of those employees on lay-off will be dovetailed. Such employees will be on the inactive seniority list. If the merged company subsequently required additional employees, preference will be given, subject to the recall provisions of article 16, first to those laid-off employees on the active seniority list, then to those employees on the inactive seniority list in accordance with their seniority and qualifications. If an when as [sic] employee who is on the inactive seniority list is recalled and reports for work in accordance with this article, his original seniority will be dovetailed with the seniority of the active employees."

In this case, the seniority lists were not dovetailed and the names of the complainants were added to the end of the seniority list of the Overland employees, except for vacation purposes where seniority was recognized.

II

In April 1993, Inter-City announced to its employees that it was ceasing operations and transferring its customer list to Overland on April 30, 1993. The transfer of the

customer list would enable Inter-City to obtain the funds required to cover the costs of laying off its employees.

Inter-City was to lay off all but 78 of its employees in Quebec and Ontario. On May 1, 1993, these 78 employees began working for Overland, 59 in Ontario and 19 in Quebec.

Before the former Inter-City employees began working for Overland in Quebec, there were several meetings and negotiations regarding their seniority. To better understand the sequence of events, it would be useful to identify the parties and establish the chronology of events relevant to the complaints, beginning in mid-April 1993.

The Intervenors

Local 106

Jean-Guy Lévesque, President of Local 106

Jean Chartrand, business agent at Overland

Jacques St-Cyr, business agent at Inter-City

Georges Gagné and Daniel Chapdelaine, Inter-City shop foremen

Patrick Bourgeois and Florent Soucy, Overland shop foremen

Overland Express

Chuck A. Cancilla and Raymond Côté

Inter-City

Mr. Hindmarch and Mr. Pelletier

The Complainants

Rosaire Dufour, Serge Vaillancourt, Robert Morin, Roger Savaria, Roland Leduc, Michel Mainville, Carl Godin, Maurice Aubine, Louis Marie Gagné, Fernand Vadeboncoeur, André Lafranchise, Jean Roy, Jacques Bélangé, Jean-Guy St-Jean, André Lagacé, Rolland Labelle, Rémi Morrisette and Donald Mcvey.

The Chronology of Events

On or about April 14, 1993, Messrs. Hindmarch and Pelletier of Inter-City met with Messrs. Jean-Guy Lévesque and Jacques St-Cyr, business agents for the Inter-City Teamsters, at the Dorval Hilton. The purpose of this meeting was to inform Local 106 representatives that Inter-City was ceasing operations, selling its customer list to Overland and transferring some of Inter-City Quebec's drivers to Overland Quebec. Mr. St-Cyr later met with the Inter-City drivers to give them the news and to assure them that their seniority would be respected.

On April 21, 1993, Mr. Jean-Guy Lévesque, President of Local 106, met with Overland's representatives at the Local 106 office. Messrs. Chuck Cancilla and Raymond Côté represented Overland, while Messrs. Lévesque, Chartrand and St-Cyr represented Local 106. Overland's two shop foremen, Messrs. Patrick Bourgeois and Florent Soucy, had been invited and were present. On the other hand, Inter-City's shop foremen had neither been informed of this meeting nor invited.

According to the testimony of various participants, the meeting was somewhat fragmented in that part of it took place between Local 106 representatives only, and part in the presence of the two Overland representatives. The testimony also revealed that the meeting focused mainly on whether or not the seniority of Inter-City drivers would be recognized by Overland. The participants described the meeting as stormy.

All issues were resolved, except the seniority issue. According to Mr. Chartrand, the seniority of former Inter-City drivers was not recognized by Overland, except for vacation purposes.

Mr. Cancilla testified that he was open to any proposal, whether this seniority would be recognized or not. However, it was essential that a definitive agreement on the complainants' seniority be reached at this meeting. He was categorical in his testimony that he had left the meeting with a firm and definitive agreement, specifically, the end-tailing of the seniority.

This appears to have been confirmed by the union in a letter dated April 23, signed by Mr. Jean-Guy Lévesque, union president, and addressed to Mr. Cancilla. On April 26, in reply to that letter, Mr. Cancilla confirmed for his part the terms of the agreement.

However, there was one condition that had to be met and it was interpreted in two different ways. We feel it is appropriate to reproduce what was written on this issue. For his part, Mr. Lévesque wrote: "However, this does not negate the right of Inter-City employees to file a collective complaint with the Canada Labour Relations Board in order to have their full seniority recognized" (translation).

Mr. Cancilla understood this condition to mean the following:

"... Nevertheless, the parties recognize that the nineteen (19) Inter-City employees could, collectively, have the right to appeal the terms of this agreement to the Canada Labour Relations Board to obtain recognition of their seniority over and above what is contained in this agreement."

(translation)

The union subsequently claimed that no agreement had been reached and that the discussions had been purely theoretical. The letters exchanged clearly state in fact that

the complainants have the right to ask the Board to determine the status of their seniority. In other words, the parties acknowledged that the agreement included "end-tailing" (adding to the end of the list) at the outset, but that this decision might be altered following an "appeal" to the Board by the former Inter-City employees. According to the union's version, Mr. Chartrand needed time "to look over the papers and understand what was involved" (translation). Mr. St-Cyr sent a letter to Mr. Hindmarch of Inter-City on April 23 contesting the agreement.

The transfer of Inter-City's customer list and drivers to Overland took place on May 1, 1993. And the complainants filed their first seniority grievance on May 5, 1993. This grievance was dismissed by Mr. Raymond Côté on the grounds of "non-compliance - Decision of this settlement - Wednesday, April 21, 1993," as appears from Mr. Côté's notes on the grievance.

The complainants then retained the services of Mr. Beck to defend their interests. On May 17, 1993, two of the complainants met with Messrs. Carrier and Jacques St-Cyr at Mr. Carrier's office to discuss their first grievance. Mr. Carrier refused to allow Mr. Beck to participate.

The next day, the complainants filed a second seniority grievance.

The same day, Mr. Raymond Côté of Overland dismissed the second grievance. He sent a letter dated May 18, 1993 to Mr. Jean Chartrand:

"This is to inform you that I am dismissing the above-mentioned grievance because it is contrary to the agreement that Local 106 entered into on April 21, 1993 at your offices.

I am upholding the decision of your Local and will end-tail the seniority of the Inter-City workers to that of the TNT Overland Express workers."

(translation)

On September 16, 1993, Mr. Soucy, Overland shop foreman, filed a grievance requesting that the complainants' seniority not be recognized. Local 106 agreed to proceed with Mr. Soucy's grievance and attached it to the complainants' two grievances. The complainants were never informed of this grievance prior to the hearing of their two grievances.

The three grievances proceeded and a hearing was scheduled for June 16, 1994. However, on June 13, 1994, Local 106 asked for a postponement on the grounds that it wished to file an application pursuant to section 44 of the Canada Labour Code seeking a declaration of sale of business. The postponement was granted. Mr. Carrier informed Mr. Beck of the postponement but not of the existence of Mr. Soucy's grievance. Mr. Beck agreed to the postponement believing that Local 106 would ask the Board to make a sale of business declaration.

At that time, Mr. Beck was still representing the complainants' interests. However, Local 106 had not revealed the existence of Mr. Soucy's grievance to Mr. Beck nor to the complainants, in spite of the contradiction between the outcomes sought by the complainants and by Mr. Soucy. Moreover, the union's intention was to present these contradictory grievances by the same counsel, thereby denying the complainants of the right to be represented by Mr. Beck.

The complainants did not receive any news about the section 44 application and had to insist that Local 106 actually prepare and file the application on August 26, 1994.

Local 106 told the complainants that filing a section 44 application would negate the need for a grievance arbitration hearing. In fact, Local 106 claimed that the solution was in the interpretation of the transaction between Overland and Inter-City. If the transaction was not a sale of business within the meaning of the collective agreement, then the collective agreement did not apply and the employee list would be end-tailed to the Overland employee list. If, on the other hand, the transaction between Overland and Inter-City was a sale of business within the meaning of the collective agreement, then the April 1993 agreement between Overland and Inter-City concerning the addition of the Inter-City employee list would be amended accordingly and the two employee seniority lists would be dovetailed.

The complainants submitted two versions of the application to the Board, identified respectively as P-25 and P-26. The complainants and their counsel, Mr. Beck, only saw the draft application (P-25) and testified that they believed that it was the draft that had been filed with the Board.

The relevant differences in the two documents are found at paragraph 9 and at the first conclusion of the application. The version submitted by the complainants (P-25) reads as follows:

"9- Local 106 respectfully submits to the Board that there was a sale of business within the meaning of section 44 of the Canada Labour Code between these companies;

...

DECLARE that there was a sale of business between Inter-City Truck Lines and Overland Express; ..."

(translation; emphasis added)

The version filed with the Board (P-26) reads as follows:

"9- Local 106 respectfully submits that the Board must determine whether there was a sale of business within the meaning of section 44 of the Canada Labour Code between these companies;

...

DETERMINE whether there was a sale of business between Inter-City Truck Lines and Overland Express; ... "

(translation; emphasis added)

In fact, counsel for Local 106 amended the application on the basis of comments made by Mr. Chartrand and instructions from Mr. Jean-Guy Lévesque. It would appear that Local 106 did not deem it necessary to inform the complainants of the amendments to the application.

The hearing into the application was scheduled to take place on April 19, 1995. It was brief because Overland's counsel, Ms. Patry, had been instructed to admit, on behalf of her client, that the transfer of the customer list constituted a sale of business within the meaning of section 44. Local 106 then requested that the hearing be suspended.

On April 26, 1995, the executive committee held a special meeting during which it decided to dismiss the outstanding grievances and adopted a resolution to this effect. The resolution reads as follows:

"Given the hearing on April 19, 1995 before the Canada Labour Relations Board and the securing of the sales contract;

Given the fact that, based on an examination of the contract in its entirety, the sale involved only the customer list and no other equipment;

Given the provisions of the collective agreement and the opinion of our legal advisors;

It is moved by Jean Chartrand, and seconded by Gérald Côté, that our legal advisors be instructed to withdraw our application before the CLRB, in light of the fact that a customer list does not constitute a sale, and to dismiss the outstanding grievances. "

(translation; emphasis added)

Local 106 acted on this resolution by withdrawing on May 15, 1995 the section 44 application that was before the Board, and by withdrawing the grievances. The complainants did not receive formal notice of the withdrawal until September 5, 1995 in a letter from Mr. Jean Chartrand. The relevant excerpts read as follows:

"In light of the withdrawal of the application before the Canada Labour Relations Board with respect to the sale of the customer list of Inter-City Truck Lines Canada Inc. to Overland Express, the union declares that the above-mentioned grievances are null and void and withdraws them.

Consequently, the current status quo applies with respect to the seniority of the employees of Overland Express, which remains the same as in 1993."

(translation)

That decision led to the present complaint brought by the former Inter-City employees whose seniority was not dovetailed with the seniority list of the Overland employees.

The complainants alleged that Local 106's decision to withdraw the application before the Board and their grievances was arbitrary, discriminatory and made in bad faith. They based their complaints on Local 106's conduct towards them.

Local 106 argued that its decision concerning the grievances and its conduct towards the complainants complied with the requirements of section 37. It alleged that the executive committee's unanimous decision was made in good faith, taking into account the interests of all the members. The union further claimed that it might have been

mistaken in concluding that there had been no sale within the meaning of the Code and the collective agreement; however, it was the union's responsibility to interpret the collective agreement. Specifically, Local 106 alleged that it had taken the necessary steps to defend the interests of the complainants by filing the grievances and the section 44 application. According to Local 106, the grievances and the section 44 application were withdrawn based on a review of the sales contract and of the opinion of its legal advisors.

III

The Board's role is to assess the union's conduct and to determine if the union has properly fulfilled its duty of fair representation pursuant to section 37. (See A. da Silva et al. (1991), 85 di 64 (CLRB no. 869); Claudio Ricci (1991), 84 di 215 (CLRB no. 863); Anthony William Amor (1987), 70 di 98; and 18 CLRBR (NS) 249 (CLRB no. 633); and Karen Ashton (1993), 92 di 55 (CLRB no. 1017).)

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The general principles of the duty of fair representation were examined in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, in which the Supreme Court of Canada stated:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted."

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 527; emphasis added)

There is no question that a union must show great diligence in cases involving seniority. Consequently, the Board will closely examine the conduct of the union in order to ensure that it fulfilled its duty of fair representation.

In this case, there is no evidence that the union acted in a discriminatory manner. Accordingly, the Board must consider the conduct of Local 106 in terms of its obligation to act in good faith and not in an arbitrary manner.

In Brian L. Eamor (1996), 101 di 76; 39 CLRBR (2d) 14; and 96 CLLC 220-039 (CLRB no.1162), the Board had to consider the concept of good faith conduct by the union:

"Bad faith refers to a subjective state of mind or conduct. It arises in circumstances where a union representative acts fraudulently, or for improper motives, or out of personal hostility or revenge. Bad faith occurs, as well, where the union, in its representative capacity, acts dishonestly or deceitfully. Likewise it is present where the failure to represent is for sinister purposes (see Brenda Haley, supra, at page 324; and Abdel Elejel, [1985] OLRB Rep. June 841, at page 852).

The concept of fair representation envisages that such representation by the union will, as the words imply, be fair and genuine and that it will be undertaken with integrity and competence (see Carmen Resel et al. (1994), 95 di 120 (CLRB no. 1086), pages 128-129). It presupposes that the union will act honestly and objectively.

To be in a position to provide a member with the kind of fair representation envisioned in Gagnon, supra, union representatives must, of necessity, avoid situations where their personal interests, or those of the union, conflict with the interests of the employee (see Fritz Steisslinger (1991), 91 CLLC 16,027 (BCIRC); Ed Cherak (1990), 10 CLRBR (2d) 59 (B.C.), reconsideration of IRC No. C59/90; and Abdel Elejel, supra). Where the union finds that the interests of an employee are in conflict with those of the union - or of the union representatives themselves - it must, at a minimum, immediately disclose the conflict of interest to the employee. It is difficult to imagine that a union's representation of a member could be seen to be undertaken with integrity and competence or otherwise be honest, objective or genuine, in circumstances where it is aware of a conflict of interest between it and its member - or of the participation of its own officers in the instigation of an investigation of that member - yet it fails or refuses to disclose same."

(pages 96; 36; and 143,377; emphasis added)

It is clear from the testimony that Local 106 had agreed with the employer at the meeting on April 21, 1993 that the complainants' seniority would not be dovetailed with Overland employees' seniority, unless "a collective complaint was filed with the Board" (translation). The employer's representative was clear; he wanted a firm and clear agreement on the complainants' seniority, either end-tailing or dovetailing. He testified that he had left the meeting on April 21, 1993 with an agreement with Local 106 according to which the complainants' seniority would not be dovetailed, upon

request by Local 106 representatives. This testimony was not contradicted by the Local 106 representatives.

The union's subsequent conduct was consistently in keeping with the April 21, 1993 agreement and Mr. Lévesque testified that Local 106 had taken the position that "this was not a sale and we never changed our position" (translation).

Local 106 filed contradictory grievances, namely, the two grievances from the complainants and a third grievance on behalf of the original Overland employees intended to counter the complainants' two grievances. In addition, the complainants were never informed of the existence of the third grievance until the hearings into this matter.

To present conflicting positions for two separate groups of the same bargaining unit at the same arbitration hearing constitutes a conflict of interest, at least on the surface. The failure to reveal this conflict of interest is a sign of the perfunctory handling of these grievances. To postpone the hearing of the grievances on the pretext of filing an application under section 44 of the Code, and then to delay the filing of the application and subsequently to amend it without notifying the complainants and their counsel, and to fail to take into account the employer's admission with respect to the application also constitute evidence of deceitful conduct on the part of the union towards the complainants. Such deceitful and dishonest conduct is tantamount to bad faith and it is evident throughout Local 106's conduct in this matter; such conduct inevitably leads to dealing arbitrarily with the complainants' grievances.

A union must act properly when it assumes the representation of an employee or group of employees with respect to a grievance. Failing to inquire into a grievance or conducting a perfunctory inquiry into a grievance constitutes arbitrary conduct by a union. A non-caring attitude towards the employees is also tantamount to arbitrary

conduct. It is appropriate to reproduce here the words of the Board in Cathy Miller (1991), 84 di 122 (CLRB no. 854):

"In viewing failures by unions in their representation of employees, the CLRB, other labour relations boards and the courts have distinguished between negligence that is merely 'simple' and negligence that is 'serious.' In the Brenda Haley case (see Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271); and Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304)), the full Board in plenary session made a policy decision that 'simple negligence' was not a breach of the duty of fair representation but that seriously negligent conduct would equate to arbitrariness and be in violation of section 37. Similarly the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; and (1984), 84 CLLC 14,043, said in effect that union representation must be 'without serious or major negligence' (pages 527; and 12,188) and in Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330, repeated that a union must represent the employee without 'serious negligence' (page 1349).

...

It appears that the Ontario Board's test to determine if there has been gross negligence in a particular case is whether the attitude of the union has been non-caring or perfunctory. In Jeffrey Sack and C. Michael Mitchell, Ontario Labour Relations Board Law and Practice (Toronto: Butterworths, 1985), there is the following summary:

'Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. As the Board said in ITE Industries:

"It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a 'flagrant error' consistent with a 'non-caring attitude', or have acted in a manner

that is 'implausible' or 'so reckless as to be unworthy of protection'. In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability."

The Board has said, however, that there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when it reflects a complete disregard for critical consequences. ...'

(page 477)"

(pages 130-131; emphasis added)

In Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); and Jean Laplante (1981), 40 di 235; and [1981] 3 Can LRBR 52 (CLRB no. 320), the Board set out the principles that it would use to assess the conduct of the union representative. Accordingly, the Board must be more demanding of a union that has the means to rely on experienced and competent business agents and to seek independent legal opinions in order to guide it in its decisions. In the case before the Board, we consider that Mr. Jean Chartrand is an experienced and competent business agent and that his conduct must be examined more closely.

In this case, the Board noted that, prior to May 3, 1993, Mr. Jean Chartrand was the union representative for the Overland employees and that, after that date, he was also the representative for the complainants. The evidence revealed that he did not act with the transparency and integrity required of the duties of his position and that his conduct was different depending on whether he was handling the grievances of former Inter-City drivers or of Overland employees. In his testimony before the Board, he did not adequately explain why he had not informed Mr. Rémi Morrisette, a former Inter-City driver, of the status of his grievance and, specifically, why he had not informed that

complainant that his grievance of June 1, 1993 was part of a collective grievance, dated September 16, 1993. That grievance, filed by Mr. Florent Soucy, a driver with Overland, was completely contrary to Mr. Morrisette's grievance. The Board is of the opinion that by playing both sides of the table and keeping at least one of the parties in the dark as to his actions, Mr. Chartrand displayed an attitude that is contrary to the duty of fair representation owed to the complainants. Furthermore, although the resolution for the withdrawal of the grievances and of the application before the Board mentions the existence of a legal opinion, it is not clear to whom the opinion was communicated; moreover, there was no evidence suggesting that the opinion took into account the employer's admission or that the opinion was relevant.

The Board notes that it was Mr. Jean Chartrand who, at the meeting of the executive committee on April 26, 1995, had explained the "givens" that precede the resolution that quashed the hopes of the complainants for recognition of their seniority. The Board also notes that it was Mr. Jean Chartrand who, four months later, had written to the employees who had filed the grievances informing them of the withdrawal. No credible explanation was given at the hearing for the delay from April 26, 1995 to September 5, 1995.

By stating that "in light of the withdrawal of the section 44 application, the union declares that the above-mentioned grievances are null and void," the union, through Mr. Jean Chartrand, failed to display towards the complainants the transparency and integrity of conduct that is required by the duty of fair representation.

The Board therefore finds that the decisions made on April 26, 1995 to withdraw the section 44 application and to dismiss the grievances are arbitrary and in bad faith, in violation of section 37 of the Code, and constitute a serious breach of the duty of fair representation to which the complainants were entitled from Local 106.

IV

This brings us to the issue of remedies.

The Board not only has the authority to order the referral of the two grievances to arbitration, but also has the right to set out certain parameters with respect to the representation of the complainants during the arbitration proceedings. In this regard, we repeat what we said in Cathy Miller, supra:

"On the other hand, while the Board has almost always confined itself to prescribing a procedural, rather than a substantive, remedy for violations of section 37, the language of section 99 of the Code is broad enough, in our opinion, to permit the ordering of something more substantive than has been the norm where such might be deemed appropriate. Section 99(1)(b) reads as follows:

'99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on; ...'

However, section 99(2) reads as follows:

'99. (2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing anything that it is equitable to require the employer or trade union to do or refrain from doing in

order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.'"

(page 128)

The Board orders the union to comply with section 37 and to reinstate the grievances on behalf of the complainants within 10 days of receipt of this decision.

The Board orders the union to refer the grievances to an arbitrator for determination in accordance with the collective agreement. To this end, the Board waives the time limits set out in the grievance and arbitration procedure.

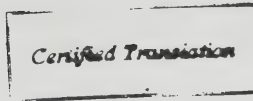
The complainants are entitled to payment by Local 106 of all legal costs and reasonable expenses related to the hearing before this Board, as well as all legal costs and reasonable expenses related to the handling of the grievances and to the arbitration proceedings; this includes any expenses and costs incurred to attend all the meetings related to the grievances.

This decision may adversely affect the rights of other Overland employees and they must be informed accordingly. The Board therefore orders Overland, pursuant to section 16(g) of the Code, to post a copy of this decision for 30 days in all of the work sites of employees included in the bargaining unit, within 10 days of the date of receipt.

Lastly, should the arbitrator uphold the complainants' grievances and order Overland to pay an amount to the complainants, said amounts will be the responsibility of the union for the period from April 26, 1995 to the date of this decision.

The Board reserves the right to determine upon application any dispute arising from the implementation of this decision and remains seized of the matter. It appoints Mr. Jean Gosselin, Senior Labour Relations Officer in Montréal, to assist the parties in implementing the decision.

We hereby order Local 106 to pay these costs and expenses.



Communications

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Summary

Charles Patry et al., *complainants*, Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees, *respondent*, and Maritime Employers' Association, *employer*.

Board File: 17514 (745-5427)
CLRB/CCRT Decision no. 1230
July 2, 1998

This decision, involving several section 37 complaints, deals with the grievance process and decision-making process in which the general membership makes the final decision as to whether or not a matter should be sent to arbitration.

Following the employer's refusal to consider maintenance employees at the Port of Montreal for posted longshoring work, the union filed a grievance which was brought to arbitration. When faced with several objections raised by the employer, including the timeliness of the grievance, the union suspended the hearing. The complainants were assured that discussions with the employer were ongoing until a general assembly was held, following which the union withdrew their grievance from arbitration since the membership had adopted a resolution precluding maintenance employees from having access to longshoring positions.

Résumé

Charles Patry et autres, *plaignants*, Syndicat des débardeurs, section locale 375 du Syndicat canadien de la Fonction publique, *intimé*, et Association des employeurs maritimes, *employeur*.

Dossier du Conseil: 17514 (745-5427)
CLRB/CCRT Décision n° 1230
le 2 juillet 1998

La présente décision, qui traite de plusieurs plaintes fondées sur l'article 37, concerne le processus de règlement des griefs et le processus décisionnel dans le cadre duquel l'ensemble des membres prend la décision finale quant au renvoi ou non d'une affaire à l'arbitrage.

Par suite du refus de l'employeur de prendre en considération les employés d'entretien au port de Montréal pour combler les postes de débardeur affichés, le syndicat a déposé un grief qui a été renvoyé à l'arbitrage. L'employeur ayant soulevé plusieurs objections, dont une concernant la prescription du grief, le syndicat a suspendu l'audience. Les plaignants ont été assurés que les discussions avec l'employeur se poursuivaient, et ce, jusqu'à ce qu'une assemblée générale ait lieu à la suite de laquelle le syndicat a retiré leur grief de l'arbitrage puisque les membres avaient adopté une résolution empêchant les employés d'entretien d'avoir accès aux postes de débardeur.



The Board concluded that the grievance process and the decision-making process that resulted in the withdrawal of the grievance were carried out in an arbitrary manner.

With respect to the general assembly - contrary to the requirement that due process be respected - the complainants were not provided with prior notice that their case would be discussed; there was a lack of full debate; the complainants were not given the opportunity to present their case and no one from the executive committee addressed the merits of the grievance in order that the membership decide the issue on the basis of proper considerations.

In failing to ensure that the process followed at the membership meeting was fair and equitable, the union breached its duty of fair representation.

Le Conseil a conclu que la procédure règlement des griefs et le processus décisionnel qui a donné lieu au retrait du grief s'étaient déroulés de manière arbitraire.

En ce qui concerne l'assemblée générale contrairement à l'obligation de suivre une procédure équitable - les plaignants n'ont pas été informés d'avance que leur cas serait débattu; il n'y a pas eu de débat complet; les plaignants n'ont pas eu la possibilité de présenter leur cas et aucun membre du comité exécutif n'a abordé la question du bien-fondé du grief afin que les membres puissent prononcer en se fondant sur des considérations valables.

N'ayant pas veillé à ce que le processus suivi par les membres soit juste et équitable, le syndicat a manqué à son devoir de représentation juste.

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Reasons for decision

Charles Patry et al.,

complainants,

and

Syndicat des débardeurs,
Local 375 of the Canadian Union
of Public Employees,

respondent,

and

Maritime Employers' Association,

employer.

Board File: 17514 (745-5427)
CLRB/CCRT Decision no. 1230
July 2, 1998

The Board was composed of Ms. Suzanne Handman and Ms. Louise Doyon, Vice-Chairs, and Mr. David Gourdeau, Member.

Appearances

Mr. Gilles Gaumond, for the complainants;

Mr. Jacques Lamoureux, for the respondent; and

Mr. Gérard Renault, for the employer.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

These section 37 complaints stem from an attempt by a number of maintenance employees to obtain positions as longshoremen at the Port of Montréal. The

complainants who were denied access to positions posted by the Maritime Employers' Association (the "MEA") allege that the Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees (the "union"), acted towards them in a discriminatory manner by refusing to process their grievance to arbitration.

The Board held a hearing in Montréal with respect to this matter and issued its decision with reasons to follow (see Charles Patry et al., December 24, 1997 (LD 1775)). These are the reasons.

I

The union is certified as the bargaining agent for a unit comprised of approximately 700 longshoremen and 60 to 65 maintenance employees. Prior to 1969, there were no maintenance employees in this bargaining unit. Their inclusion resulted from the recommendations contained in the report of the Picard Commission, established by the federal government in response to labour disputes in the longshoring industry. Other recommendations were imposed by Parliament on the concerned parties in a collective agreement which, for the first time, provided longshoremen working in St. Lawrence ports with job security (see Gérard Cassista et al. (1978), 28 di 955; and [1979] 2 Can LRBR 149 (CLRB no. 161)).

In the late 1970s, following the closure of one of the member companies of the MEA in Québec, a number of maintenance employees came to Montréal. It is approximately half of this group of employees, now numbering 60 to 65, who are affected by these complaints.

II

At the end of July 1995, the MEA posted a notice entitled "General Notice of Positions" to fill a certain number of longshoring positions that would become available. This posting came about following the renewal of the collective agreement

in June 1995, which provided that up to 190 of the most senior employees would leave by means of a voluntary buy-out program to reach an employment level of 760.

The positions covered by the posting, classified as primary positions, were considered to be desirable by junior employees as well as employees with several years of service. The employees covered by the job security provisions of the collective agreement were eligible to apply for the posted positions.

In July 1995, Mr. Charles Patry and other maintenance men at the Port of Montréal applied for positions in accordance with the general posting. Although their primary classification was in the area of maintenance, they considered they had the right to apply for the posted positions since they are covered by the collective agreement's job security provisions. In addition, maintenance employees have performed longshoring work as replacements during vacations, when shortages occur, or - as evidenced by the case of Mr. Marc Patry - actually work principally as a longshoreman, despite having a primary classification as a maintenance man. Moreover, prior to submitting their applications for the posted positions, the complainants consulted and obtained confirmation from the union president and another officer that they had the right to apply.

At the time the available positions were granted in October 1995, the applications of Mr. Patry and the other complainants were refused by the MEA. With few exceptions - primarily those who were ill or incapacitated or whose positions were abolished - all maintenance employees, including those maintenance men who worked as longshoremen virtually full time, were excluded from the posted longshoring work, despite the fact there were no restrictions in the posting.

III

Mr. Michel Fortin, one of the complainants, frequently went to meet the union officers to obtain information about the posting. On one such occasion, during the week of October 20, when vice-president Desrochers opened his file, Mr. Fortin noticed a letter dated October 16, 1995, which specified that maintenance employees were excluded from the process. He asked Mr. Desrochers to file a grievance but was counselled not to do so at that time. Since the parties were in negotiations concerning their case, Mr. Desrochers considered it would put a monkey wrench into the process. Upon Mr. Fortin's insistence, Mr. Desrochers agreed to present a grievance and said he would file it that evening.

The union told the Board it was far from certain that it would win in arbitration, but it had filed the grievance as a means of protecting the complainants' rights and buying time. Mr. Desrochers had asked the business agent, Mr. Matte, to draft the grievance on the last day for doing so and assumed that it had been faxed to the employer. Thereafter, Mr. Desrochers was no longer concerned with the grievance file since it was not his domain.

On November 2, 1995, the union did submit a grievance dated October 27, 1995, contesting the MEA's refusal to consider the maintenance employees for the primary classifications in the August 1995 posting. In the ensuing period, the complainants were told that their grievance was proceeding. A couple of the complainants who maintained regular contact with the union officers were also advised that the union was negotiating with the employer in an attempt to resolve the problem.

The grievance was scheduled for arbitration before Mr. Alain Corriveau. Prior to the hearing, the employer objected to an amendment of the grievance presented by the union and at the hearing itself, held on March 12, 1996, the employer raised further objections relating to past practice and to the timeliness of the grievance. It was then that the union discovered that the grievance had been remitted to the employer on

November 2, 1995, and the MEA's acknowledgement of receiving the grievance showed it to be untimely. In light of the employer's opposition to its amendment and faced with arguments relating not only to past practice but also to prescription, the union began discussions with the employer and suspended the arbitration hearing in the hope of finding the fax transmitting the grievance but never found any trace of it.

During their discussions with the MEA which took place in January and in May 1996, the union sought to have the maintenance employees considered for longshoring positions after 10 to 15 years of service. The employer, as a counterpart, wanted a reduction in employment level - which the union opposed.

The union officers advised Mr. Charles Patry that the grievance was suspended but negotiations with the MEA were on-going. He was assured by both the union president and vice-president, whom he met on several occasions, that they were taking care of his case. These assurances continued - until the June 19 general assembly - following which the union withdrew the grievance.

The maintenance men who attended the meeting on June 19, 1996 - as well as those who did not attend - claimed they were not advised beforehand that their case would be submitted to the members and the outcome of their grievance could be decided at that meeting. In the absence of prior notice or agenda, a number of the complainants did not attend the general assembly since they did not know their case would be discussed. While there had been rumours about their case being raised, it was their understanding from what they had heard that this would constitute a report concerning the status of negotiations with the employer.

The complainants stated that they were provided with an agenda as they entered the meeting. One of the topics listed under the heading of the president's report was that of "maintenance men". When the president, Mr. Michel Murray, came to this topic, he presented a report on the notion of maintenance employees, with 10 to 15 years service having the possibility of access to longshoring positions. Events moved very

quickly after that. One of the longshoremen, Mr. Bishop, proposed the following motion that would require maintenance employees to remain working in their current positions in the garages:

"That maintenance men be forbidden to participate in or be included in the August 1995 general posting for positions in the primary classification and that they are obliged to remain in the garages."

(translation)

According to the complainants, two or three longshoremen came forward to speak in favour of the motion. Then the call for the question terminated all further discussion. Mr. Murray wished to intervene but given that the question was called, he was cut off. Mr. Charles Patry testified that he had not attempted to intervene given that the president himself had been unable to do so.

According to the union's evidence, there were intervenors on both sides of the debate. Mr. Theo Beaudin, a retired longshoreman and now a consultant to the union, who was present at the general assembly, testified that he was not in favour of the resolution and claimed that opinion was divided. When cross-examined, he denied he had prepared the motion but did not recall whether Mr. Bishop had spoken to him about it. The president, however, attested to the fact that there were rumours about such a motion being presented at the general assembly.

Afterward, in the capacity as a simple member, Mr. Murray tried to give his point of view and explain the consequences of this proposal, but the vote had already taken place and the motion adopted. He testified that he did not agree with what had taken place. The members, however, had expressed themselves in strong language and it was his perception that the motion was presented to maintain the status quo. Mr. Desrochers believed that the proposal was in response to a fear that the level of employment would be reduced.

A second motion was presented at the meeting. This one would allow employees unable to perform their work as maintenance men, because of medical reasons, to obtain work as longshoremen. Mr. Murray who intervened in favour of this motion explained that it simply confirmed the existing practice. This motion was adopted without difficulty.

Mr. Desrochers told the Board that the executive committee was not very pleased with the result of the general assembly, but given the motion that had been adopted, the union ceased negotiating with the employer and withdrew the grievance.

IV

The complainants' argument, reduced to its essence is that the executive committee's manoeuvres in bringing the issue to what amounts to a stacked general assembly rather than proceeding directly with it, coupled with the fact that it failed to process the grievance in a timely fashion, constitute arbitrary and discriminatory behaviour.

Counsel for the union submits that, pursuant to section 37 of the Code, there must be rights involved under a collective agreement, whereas in the present case the issue before us is a problem of negotiation and not one concerning the collective agreement.

As for the grievance in issue, it was filed strategically as a means of bringing the employer to negotiate with the union but is not well founded. Counsel argues that the union is not required to defend a grievance particularly when, as in the present case, there are grounds for not doing so.

V

Section 37 of the Code provides the statutory basis for a union's duty of fair representation. In light of the exclusive power conferred upon a union to act on behalf

of the employees in a bargaining unit, it has the corresponding obligation to fairly represent all employees comprised in its unit.

In the context of a section 37 complaint, the Board has no jurisdiction to examine the merits of a case and consequently makes no finding as to the complainants' entitlement to the positions they sought in the general posting. Our enquiry is restricted to the union's conduct, the focus being to determine whether or not, in its handling of the complainants' grievance and in the ensuing decision-making process which ultimately led to the withdrawal of the grievance from arbitration, the union fulfilled its duty of fair representation pursuant to section 37 of the Code (see Brian L. Eamor (1996), 101 di 76; and 96 CLLC 220-039 (CLRB no. 1162), upheld by the Federal Court of Appeal (Canadian Air Line Pilots Association v. Brian L. Eamor et al., judgment rendered from the bench, no. A-467-96, June 18, 1997; Gary Ferguson (1997), 105 di 56 (CLRB no. 1213); and A. da Silva et al. (1991), 85 di 64 (CLRB no. 869)).

Accordingly, the union's conduct is examined in consideration of the requirements set out in section 37 of the Code, namely that it not act in a manner that is arbitrary, discriminatory or in bad faith. In the present case, however, bad faith on the union's part has not been alleged.

In various Board decisions, arbitrary conduct is described by an attitude that is non-caring, cursory, or perfunctory and one that encompasses gross negligence and a reckless disregard for the employee's interests. In contrast to discriminatory behaviour, this behaviour does not involve an element of intent and has been qualified in Jeffrey Sack, Q.C., and C. Michael Mitchell, Ontario Labour Relations Board Law and Practice (Toronto: Butterworths, 1985), as follows:

"Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors or principles, or displaying

an attitude which is indifferent and summary, or capricious and non-caring or perfunctory. ... "

(page 477)

The Board has distinguished between "simple" and "serious" negligence. While honest mistakes do not attract liability, seriously negligent conduct amounts to arbitrariness and violates section 37. As was cited in Ontario Labour Relations Board Law and Practice, *supra*:

"... there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when it reflects a complete disregard for critical consequences. ... "

(page 477)

VI

While some unions allow the general membership to make the final decision as to whether or not a matter should be sent to arbitration, there are few reported decisions of unfair labour practice complaints on this issue. The Board initially considered the validity of such a process in M.A. Ladds (1991), 85 di 160; and 91 CLLC 16,054 (CLRB no. 879), upheld by the Federal Court of Appeal (Michael A. Ladds v. Amalgamated Transit Union, Local 279 et al., judgment rendered from the bench, no. A-677-91, February 24, 1993), and concluded that there is nothing wrong per se with a system in which the whole membership decides if a grievance is pursued to arbitration. The Board, however, cautioned that a system of this nature can work perversely:

"With direct democracy, there is the potential for a meeting to degenerate into a mob scene and to spawn a highly irrational conclusion simply because those present don't like somebody or what

he stands for and have chosen to ignore the real merits of an issue affecting him..."

(pages 167; and 14,552)

The Board, in that case and in subsequent decisions, has rejected arguments that the union's inability to explain the reasoning for a particular decision and the process of decision-making by union membership inevitably leads to miscarriages of justice. Rather, the Board has assessed the circumstances leading to the decision reached to determine whether there has been a violation of section 37 of the Code.

Thus, the Board found no breach of the Code in M.A. Ladds, supra, and in Gilles Charlebois (1993), 91 di 14 (CLRB no. 989), upheld by the Federal Court of Appeal (Gilles Charlebois v. Amalgamated Transit Union Local 279 et al., judgment rendered from the bench, no. A-203-93, April 26, 1994), where the membership voted against sending a grievance to arbitration despite a favourable legal opinion. The factors considered by the Board include the neutral manner in which the meeting was conducted and the opportunity given to the complainant to state his case and answer questions from union members.

On the other hand, in Jean Ryan (1993), 92 di 220 (CLRB no. 1032), as in Ghyslaine Dagenais, no. 91T-1129, July 23, 1991 (Quebec Labour Court), the Board considered the union's conduct to be arbitrary when the membership - in the absence of relevant information and a proper consideration of the merits of the grievance - decided against proceeding to arbitration:

"There is no doubt that the local executive and Ms. Warren were very familiar with the case, but they did not make the decision. It was therefore necessary that all relevant information be provided to the membership at the meetings to enable them to make an enlightened decision. However, the evidence showed that the membership was not told of Ms. Warren's position or of CUPE's program to assist locals in paying the arbitration costs, if necessary. It also showed that the complainant could not present her case at the

morning meeting and that she was put in a very awkward position to do so at the afternoon meeting. We cannot therefore conclude that the membership, the decision-making authority in this case, examined Ms. Ryan's case thoroughly. Consequently, the Board finds that CUPE Local 2365 acted arbitrarily when it made its decision on December 17, 1992, thereby violating section 37 of the Code."

(page 225)

A stricter approach was adopted by the Ontario Labour Relations Board in Ivan Cvicek, [1995] OLRB Rep. Feb. 105. The OLRB considered that a decision not to proceed to arbitration based upon a vote of the executive and steward body did not relieve the union of its obligation to explain why it decided not to proceed to arbitration. The lack of an explanation together with such factors as the union's failure to allow the grievor to participate in the decision-making meeting led the Board to conclude that the union had acted arbitrarily.

The Saskatchewan Labour Relations Board in Johnston (1997), 97 CLLC 220-048, has gone even further by deciding that the very use of a referendum ballot as a means of making a decision about the fate of an individual employee is, by its very nature, arbitrary. In upholding the complaint, the Board considered that the decision not to proceed to arbitration, made by the membership, was neither amenable to explanation nor accountable to the grievor or to the union executive which, after careful consideration, had reached a contrary conclusion. Furthermore, it was impossible to know whether or not the decision was based only on appropriate considerations.

VII

Following a review of the evidence, the Board concludes that the union failed to fulfil its duty of fair representation with respect to the complainants. For the reasons set out below, both the grievance process and decision-making process were handled in an arbitrary manner.

From the outset, the conduct of the union officers shows a lack of care. The union, which knows there are strict time limits for filing a grievance, suggests that it resolve the maintenance employees' problem by means of negotiation without assuring that the rights of the complainants were protected. However - in the absence of any grievance - if a settlement is not reached, the complainants would have no other recourse available to them. Although the union did file a grievance upon the insistence of one of the complainants, little care was taken with its drafting such that the union subsequently considered an amendment to be necessary. More importantly, the grievance filed was untimely despite the fact the request to file it was made well within the prescribed time limits, and the complainant who had made the request was told the grievance would be submitted that evening. No records were kept with respect to its transmission to the employer. The vice-president claims the file was not his responsibility. However, the union did not provide any information as to who was responsible for filing the grievance or for its follow-up. In fact, the union provided no satisfactory explanation regarding its conduct.

The union contends that the grievance was not well founded and it had filed it only as a strategic means to force the employer to negotiate. This claim appears to be a belated justification, particularly in light of the fact that the complainants were never advised that this was the union's intent.

This brings us to the June 19 general assembly. In past decisions, the Board has held that a union is not precluded from having the general membership determine the outcome of a grievance and we maintain this view. In such cases, the Board does not analyze or rule upon the union's internal decision-making process provided, of course, that the process itself is fair and genuine. Consequently, it is not the appropriateness of such a procedure that is examined by the Board but rather the manner in which the process is carried out.

When issues are determined by the general membership, the union must ensure that the process followed is fair to all concerned. Moreover, when members have distinct or divergent interests, a higher degree of diligence is required. The trade union must take even greater care to ensure that the criteria of fairness and due process are respected.

The union's conduct in these circumstances will be closely scrutinized by the Board. Amongst the factors the Board will consider are: whether the grievor was given adequate notice of the meeting and provided with the opportunity to attend; whether full debate has taken place and questions answered; whether the grievor had the opportunity to present his or her case; and whether the membership was presented with sufficient information on the merits of the issue by those familiar with the case to allow them to make an informed decision.

In the present instance, after considering the evidence of what transpired at the general assembly, the Board is of the view that due process was not respected. Leaving aside the question of whether the general assembly can render a decision regarding a grievance - when such decision-making authority, according to the union's constitution, is vested in the grievance committee - we find that the entire process was significantly flawed.

The union's officers brought the issue of the maintenance employees before the general assembly after the arbitration hearing was suspended in the face of the prescribed grievance. While the union placed the subject of the maintenance employees on the agenda in the context of its reporting functions, it knew or should have known that the rights of these employees could potentially impact on employment levels and, as a result, this topic was a sensitive and contentious issue. It was evident, particularly in light of the abounding rumours and the divergent interests of the employees concerned, that the subject would spill over into debate and could very well

result in a decision being taken by the members. In such circumstances, the union must ensure that the issue is fully examined and that all precautions are taken so that the process is carried out fairly. Clearly, this did not occur at the June 19 meeting.

The complainants were not provided with prior notice that their case would be discussed at this meeting nor were any measures taken to ensure that the complainants would be present. The issue of maintenance employees was dealt with expeditiously. By all accounts, the discussion was heated, the debate was brief and was brought to a close on a procedural issue. No provision was made by the union for the complainants to address the meeting and none of them had the opportunity to present their position. In fact, given the way in which the meeting proceeded, they were precluded from expressing their views. Furthermore, no one from the executive committee who was aware of all the considerations involved intervened or discussed the merits of the maintenance employees' grievance in order that the membership decide the issue on the basis of proper considerations.

In sum, the whole decision-making process that resulted in the withdrawal of the complainants' grievance was carried out in a manner that, at best, can be described as seriously negligent and consequently, arbitrary. The union and its representatives failed to ensure that the complainants were provided with due process. In not having followed a fair and equitable process, the Board finds that the union breached its duty of fair representation.

Accordingly, the Board:

ALLOWS the complaints;

DECLARES that the union violated section 37 of the Code;

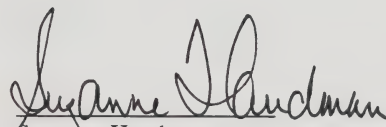
ORDERS that the union refer the grievance to arbitration and waives the time limits that apply to the grievance and arbitration procedures foreseen by the collective agreement;

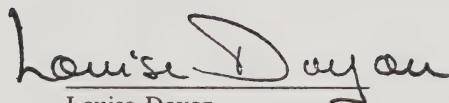
PERMITS the complainants to be represented by counsel of their choice for the purposes of the arbitration if they so desire and, in such eventuality, orders that the union pay the cost of such representation;

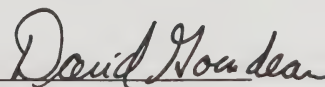
ORDERS that the union assume the legal fees and reasonable expenses incurred by the complainants with respect to the preparation and hearing of the present complaints;

RETAINS jurisdiction to determine, if necessary, the share of compensation the union would be required to pay if the arbitration decision awards any compensation;

RETAINS jurisdiction to deal with any question arising from the application of these orders and appoints Mr. Jean Gosselin, Senior Labour Relations Officer, to assist the parties, if necessary.


Suzanne Handman
Vice-Chair


Louise Doyon
Vice-Chair


David Gourdeau
Member

information

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Summary

Debbie Edison, *complainant*, Public Service Alliance of Canada and Local X3040, *respondents*, and Northern Transportation Company, *employer*.

Board File: 16551 (745-5057)
CLRB/CCRT Decision no. 1231
July 7, 1998

Résumé

Debbie Edison, *plaignante*, Alliance de la Fonction publique du Canada et section locale X3040, *intimées*, et Northern Transportation Company, *employeur*.

Dossier du Conseil: 16551 (745-5057)
CLRB/CCRT Décision n° 1231
le 7 juillet 1998

The complainant alleges that the respondent union breached section 37 of the Code by refusing to process a grievance concerning her failure to obtain a position with the employer during its 1994 season and by not having filed a grievance with respect to her termination.

The Board has no jurisdiction to deal with the first aspect of the complaint since it was filed outside the strict 90 day time limit provided by section 97(2) of the Code and is, therefore, statutorily barred.

La plaignante allègue que le syndicat intimé a violé l'article 37 du Code en refusant de poursuivre un grief concernant son défaut d'obtenir un poste auprès de l'employeur pendant la saison de 1994 et en n'ayant pas déposé de grief à l'égard de sa cessation d'emploi.

Le Conseil n'a pas compétence sur le premier volet de la plainte puisque celle-ci a été déposée après l'expiration du délai de 90 jours prévu au paragraphe 97(2) du Code. Cet aspect de la plainte est donc prescrit.



The second aspect of the complaint relates to the termination of the complainant's employment in November 1994. In response to her request for assistance, the president of her local union advised her that a prior grievance that was submitted in July 1994 was ongoing, leading her to believe that her grievance was being pursued. This was not, in fact, the case. When the complainant subsequently discovered that the union had never filed a termination grievance, she lodged a complaint with the Board.

Although the union had not presented a grievance with respect to the complainant's termination in the fall of 1994, it ultimately took steps to remedy the problem. Upon being made aware that a grievance had not been submitted, the union's national office filed a union grievance on the complainant's behalf and referred it to arbitration. In view of the action taken by the union to cure its initial failure to file a termination grievance, the Board considers that the union fulfilled its duty of fair representation.

Le deuxième volet de la plainte a trait à la cessation d'emploi de la plaignante en novembre 1994. En réponse à sa demande d'aide, le président de la section locale lui a indiqué qu'un grief antérieur déposé en juillet 1994 était en cours, ce qui a amené la plaignante à croire qu'on donnait suite à son grief, ce qui n'était cependant pas le cas. Lorsque la plaignante a découvert par la suite que le syndicat n'avait pas déposé de grief concernant sa cessation d'emploi, elle a déposé une plainte auprès du Conseil.

Même si le syndicat n'a pas déposé de grief concernant le congédiement de la plaignante à l'automne de 1994, il a par la suite pris des mesures pour remédier au problème. Après avoir été informé qu'aucun grief n'avait été déposé, le bureau national du syndicat a déposé un grief syndical au nom de la plaignante et a renvoyé ce grief à l'arbitrage. Compte tenu des mesures prises par le syndicat pour remédier à son manquement initial de déposer un grief concernant la cessation d'emploi, le Conseil est d'avis que le syndicat s'est acquitté de son devoir de représentation juste.

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LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Debbie Edison,

complainant,

Public Service Alliance of Canada,
and Local X3040,

respondents,

Northern Transportation Company,

employer.

Board File: 16551 (745-5057)
CLRB/CCRT Decision no. 1231
July 7, 1998

The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Mr. Patrick H. Shafer and Ms. Véronique L. Marleau, Members.

Appearances

Mr. Tom McCauley, for the complainant;

Mr. Chris Dann, for the Public Service Alliance of Canada; and

Mr. D. Sean Day, for the Northern Transportation Company Limited.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

This case concerns a complaint filed by Ms. Debbie Edison alleging violation of section 37 of the Code by the Public Service Alliance of Canada and its Local X3040. The complainant alleges that the respondent union breached its duty of fair representation by refusing to process a grievance filed in July 1994 contesting the fact she had not been awarded a position during the employer's 1994 season and by failing to file a grievance in November 1994 with respect to her termination.

I

The complainant, Debbie Edison, commenced employment with the Northern Transportation Company Limited in Hay River, NWT, on June 11, 1991 as a Clerk 1 in a seasonal capacity, typically beginning in May of each year and terminating in October of the same year. The complainant worked during the 1992 and 1993 seasons and, although she was subject to recall and had advised the company of her interest in returning to work, she was not recalled for the 1994 season. She applied for other positions for which she considered she was qualified but was unsuccessful in the competitions.

Ms. Edison asked the president of her local union, Mr. Allan Gibb, to file a grievance with respect to her failure to obtain these positions for the 1994 season. Although a grievance was filed on July 5, 1994 as requested, it was abandoned prior to the arbitration level. The grievance and adjudication section of the Public Service Alliance of Canada (the "Alliance") had decided not to pursue the grievance to arbitration, based upon its interpretation of the collective agreement and its belief that there was no possibility of succeeding before an arbitrator. The union's reasons were transmitted to the complainant on August 11, 1994 together with a recommendation that - because she could be in danger of losing her seniority - she should apply for any vacant positions without delay. The complainant did so but ultimately did not obtain employment that season.

On November 8, 1994, the employer advised her that effective November 7, 1994 her employment was terminated. It based its decision on article 14.06(c) of the collective agreement, which provides that an employee who is laid off and not recalled to service within a 12-month period forfeits all seniority. Ms. Edison was given a cheque representing two weeks' pay, which constituted the severance pay provided by the collective agreement.

Shortly after receiving this "termination letter", Ms. Edison spoke to the president of Local X3040, Mr. Allan Gibb, seeking his assistance. She considered that she was entitled to compensation for the 1994 season and wanted a position for the 1995 season. According to the complainant, Mr. Gibb advised her that there was an outstanding grievance and since her grievance was ongoing, it was not necessary to file another one. She testified that during subsequent conversations with Mr. Gibb, she was led to believe that her grievance was being pursued. In addition, Mr. Gibb provided her with job postings and suggested that she apply for them.

In the interim, the complainant had consulted legal counsel. Her lawyer, Mr. Michael Triggs, considered that since Ms. Edison had not been notified that she would not be recalled for the 1994 season, she had been denied her bumping rights. He contacted Mr. Gibb on November 25, 1994 asking that a grievance be filed immediately since it was the last day for doing so. He then called Ms. Evelyn Henry, the Section Head of the Alliance's grievance and adjudication section, and asked her to call Mr. Gibb to ensure that a grievance was filed that day. Mr. Triggs testified that in his initial conversation, Mr. Gibb said that he would present a grievance and subsequently, on November 22, 1994, confirmed that a grievance had been filed.

Ms. Edison said that in February 1995 she telephoned Ms. Henry at the Alliance's head office regarding the status of her grievance and discovered that Ms. Henry knew nothing about it. Sometime in late March or early April, Ms. Edison was told that a grievance had not been filed. This led to the filing of the present complaint with the Board.

Ms. Edison moved from Hay River in July 1996. However, she had been available to work for the company in 1995, and during that year she had applied for at least 10 positions with the company.

II

The respondent union is a large trade union representing more than 150,000 members - primarily in government service - throughout Canada. The union's structure consists of a head office located in Ottawa with regional offices throughout the country. It is comprised of 18 components. In turn, each component consists of several locals. In this instance, the complainant is a member of Local X3040, which represents employees of Northern Transportation Company Limited, the employer.

Mr. Allan Gibb, elected president of Local X03040 in 1994, was well aware of Ms. Edison's employment situation. He had filed a grievance on her behalf when she was not recalled to work in the 1994 season, contesting the company's refusal to consider her for a switchboard/receptionist position and permit her to exercise her seniority rights. He considered the case to have merit and was angry when he learned that the Alliance's adjudicative section had decided it would not refer the grievance to arbitration.

In November, Ms. Edison called him after receiving her "termination letter" and they discussed possible recourses. Mr. Gibbs stated that he looked for articles in the collective agreement on which to base a grievance but could find nothing to grieve. He also consulted his regional vice-president and following their discussion, they could find no basis for filing a grievance. However, he believed that the grievance filed in July was being held in abeyance until it could be reinforced with "sufficient ammunition". Since he thought they were gathering evidence to support the existing grievance, he did not believe he had to file another one. He communicated his understanding of the continued existence of the July grievance to Ms. Edison.

Mr. Gibb recalled that he had spoken with Ms. Edison's lawyer in November but denied he had agreed to file another grievance. He considered there was no need to do so given that there was an ongoing grievance still in place.

Mr. Gibb also spoke with Ms. Henry following her conversation with the complainant's lawyer. She understood there was a problem with respect to the wording and the filing of a grievance and tried to advise Mr. Gibb as to how to handle the issue. Their conversation, however, was not very cordial and she had little chance to discuss the matter with him. Mr. Gibb expressed his views and then hung up. For Mr. Gibb, the problem was not in filing a grievance but rather with the Alliance not referring it to arbitration. Ms. Henry had no further contact with Mr. Gibb with respect to filing the grievance since she assumed that it had been filed.

The Alliance's grievance and adjudication section is not normally involved in filing grievances. Grievances are initiated at the local level. However, when Ms. Henry was made aware that no grievance had been filed with respect to Ms. Edison's termination, she intervened, asking the employer to extend the time limits provided by the collective agreement to allow Ms. Edison to file a grievance. When her request was denied, the Alliance presented a union grievance on May 10, 1995 on Ms. Edison's behalf. It requested that Ms. Edison be given priority for employment in positions for which she was qualified before the company considered applicants from outside the bargaining unit. According to the union, Ms. Edison's loss of seniority did not automatically result in the loss of her status as an employee and she retained rights under the collective agreement.

The case proceeded to arbitration. By virtue of the award rendered on December 14, 1995, the arbitrator upheld the grievance and directed the company to comply with the collective agreement by giving Ms. Edison priority for employment in positions for which she was qualified.

After the award was issued, the president of the local union asked that the employer compensate Ms. Edison for the receptionist's position she sought in June 1995 but which was awarded to another person who was not a member of the bargaining unit. The parties, having failed to come to an agreement with respect to this issue, referred the matter back to the arbitrator.

In a further award dated April 3, 1996 - notwithstanding the finding that Ms. Edison had not lost employee status - the arbitrator held that no compensation was payable to Ms. Edison given that such a remedy had not been requested by the Alliance and Ms. Edison had not filed an individual grievance. The arbitrator concluded that she would not have been entitled to compensation in any event since there was at least one other qualified bargaining unit member who had more seniority than Ms. Edison. Had the company properly applied the collective agreement, that other employee would have obtained the position and not Ms. Edison.

Following these arbitration awards, the complainant requested that the Board proceed with her complaint.

III

Following certification, a union has exclusive power to represent the employees in the bargaining unit. At the same time, it has the corresponding obligation to exercise this power in good faith and in a manner that is not discriminatory or arbitrary. The statutory basis for the union's duty of fair representation is set out in section 37 of the Code.

In dealing with a section 37 complaint, the Board does not have jurisdiction to examine the merits of an employee's case nor does it judge the manner in which the union interprets the provisions of its collective agreement. The Board's focus is on the union's conduct, our role being to determine whether or not in handling the complainant's

grievance the union fulfilled its duty of fair representation pursuant to section 37 of the Code (see James H. Rousseau (1996), 102 di 17; and 97 CLLC 220-007 (CLRB no. 1173); and Gary Ferguson (1997), 105 di 56 (CLRB no. 1213)).

The scope of this duty has been set out in the leading case Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, as follows:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 527)

IV

Counsel for the complainant submits that the events from the summer of 1994 until the arbitration award, rendered in 1996, are relevant to the section 37 complaint and that the union had a continuing duty of fair representation during this entire period. Accordingly, counsel suggests that the Board not limit itself to the issues arising out of the November 8, 1994 termination letter but that it consider the totality of the evidence which, counsel contends, shows that gross negligence was involved.

Despite the compelling arguments presented, the Board cannot accede to counsel's suggestion that the Board deal with the issues of the 1994 season. To do so would involve an examination of the union's conduct with respect to matters that are now statutorily barred.

Specifically, in order for the Board to consider whether the union breached its duty in handling the July 5th grievance, Ms. Edison would have had to file her complaint within 90 days from the time she was aware of the Alliance's decision not to refer her grievance to arbitration. Ms. Edison received the Alliance's letter of August 1994, which expressly stated that it did not intend to pursue her grievance. Her complaint dated April 6, 1995 is clearly outside the strict 90-day time limit provided by section 97(2) of the Code. As the Board cannot extend these time limits, it has no jurisdiction with respect to that aspect of the complaint regarding the July grievance (see Mike Sheehan (1979), 35 di 98; [1979] 3 Can LRBR 7; and 79 CLLC 16,191 (CLRB no. 201)).

V

The second aspect of the complaint relates to the union's failure to file a grievance on behalf of Ms. Edison after she received a letter from her employer on November 8, 1994, terminating her employment.

Counsel for the complainant submits that Ms. Edison was misled by the president of the local union; their continuing exchanges gave her reason to believe that her grievance was ongoing when in fact no grievance had been filed. Counsel also contends that although there may have been a mistaken belief as to the status of the grievance, once the Alliance's officers at the local and national level became aware of the problem, positive steps should have been taken - which according to counsel did not occur.

In determining whether or not the union's conduct amounted to a violation of the Code, the Board considered what the union had done after the complainant received the termination letter from her employer.

Given the nature of the letter and the complainant's request for assistance, the union was required to act with diligence. The president of the local union advised her that it was not necessary to file another grievance since there existed an outstanding grievance. Given that Mr. Gibb was aware that the Alliance was not referring the July grievance to arbitration, it is difficult to comprehend how he could advise her that her grievance was ongoing. While there may have been a misunderstanding as to the status of the grievance, the union was subsequently alerted to the problem by the complainant's counsel. Ms. Henry, the Section Head of the Alliance's grievance and adjudication section, did contact the local president, but because of their abrupt and heated conversation, the problem was not resolved nor was there any follow-up. Although the evidence shows that the union initially failed to deal with the November termination due

to a misunderstanding, the union ultimately did take steps to resolve the matter in another fashion when the national office was made aware of the situation.

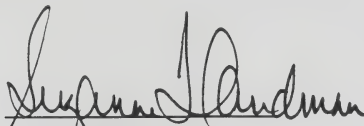
Upon learning that a grievance had not been filed, Ms. Henry, at the national level of the Alliance, stepped in and attempted to file a grievance on behalf of Ms. Edison. When faced with the employer's refusal to extend time limits, it filed a union grievance on her behalf and referred it to arbitration. Following the arbitration award upholding the grievance, the local president attempted to obtain compensation for Ms. Edison, albeit unsuccessfully.

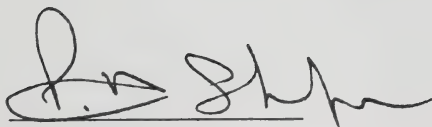
Counsel for the complainant contends that the union grievance did little for Ms. Edison since she received no compensation. However, it is important to note that the arbitrator concluded that given the facts, no compensation was payable to her in any event.


It is equally important to note that the object of the union grievance filed in May 1995 - namely that she be granted priority for employment in positions for which she was qualified - was the same as that which could have been filed as an individual grievance in November 1994. The arbitration award, which recognized Ms. Edison's right to priority, provided her with the remedy that was available. Consequently, Ms. Edison did not suffer any prejudice by virtue of the fact that the union had not filed a grievance at the time she received her termination letter. In sum, the initial negligence on the union's part in not filing a grievance in November 1994 was remedied by the subsequent union grievance presented on the complainant's behalf in May 1995. Furthermore, any remedy that she may have been granted prior to the arbitration has been subsumed by the arbitration process (see James H. Rousseau , supra).

In view of the steps taken by the union to cure its failure to file a termination grievance for Ms. Edison, as requested in the fall of 1994, the Board finds there was no breach of section 37 of the Code.

In light of the foregoing, the Board, having found that the union has not breached its duty of fair representation, dismisses the complaint.


Suzanne Handman
Vice-Chair


Patrick H. Shafer
Member


Véronique L. Marleau
Member

information

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Summary

Association of Postal Officials of Canada, *complainant*, and Purolator Courier Ltd. *respondant*.

Board File: 17069-C (745-5219)
CLRB/CCRT Decision no.1232
August 28, 1998

This is a complaint by the Association of Postal Officials of Canada alleging that the respondent employer, Purolator Courier Ltd., contravened section 94(3)(a)(i) of the Canada Labour Code by terminating the employment of Mr. Arnold Sookoo.

The Board found that the respondent employer did not discharge its burden of proof and breached the Code by terminating Mr. Sookoo because of his union activities.

As to the release signed by Mr. Sookoo, the Board found that it was ineffective to cover recourses under Part I of the Code and that in the circumstances of this case did not constitute an informed consent to the release of such rights.

Given the finding as to the insufficiency of the release, the Board did not deal with the employer's contention that a validly signed release necessarily constitutes a waiver of any remedy to which an individual may be entitled.

Résumé

Association des officiers des postes du Canada, *plaignante*, et Purolator Courrier Ltée, *intimée*.

Dossier du Conseil: 17069-C (745-5219)
CLRB/CCRT Décision n°1232
le 28 août 1998

Il s'agit d'une plainte déposée par l'Association des officiers des postes du Canada, alléguant que l'employeur intimé, Purolator Courrier Ltée, a enfreint le sous-alinéa 94(3)a(i) du Code canadien du travail en mettant fin à l'emploi de M. Arnold Sookoo.

Le Conseil a conclu que l'employeur intimé ne s'est pas acquitté du fardeau de la preuve qui lui incombait et a violé le Code en mettant fin à l'emploi de M. Sookoo en raison des activités syndicales de ce dernier.

Quant à la renonciation signée par M. Sookoo, le Conseil a conclu qu'elle était inefficace pour empêcher les recours en vertu de la Partie I du Code et que, dans les circonstances de l'espèce, elle ne tenait pas d'un consentement éclairé.

Ayant conclu à l'insuffisance de la renonciation, le Conseil ne s'est pas penché sur la prétention de l'employeur selon laquelle une renonciation valablement signée constituait nécessairement un abandon de tout redressement auquel une personne pourrait avoir droit.

That being said, the specific remedy that is afforded to the employee is a matter of Board discretion and the Board will take all the circumstances of the case into account, including the circumstances under which the employee has signed a release and the nature and scope of the release before deciding upon the appropriate remedy. Allegations of bad faith are certainly relevant to this determination, but the Board heard no evidence to convince it that the complainant acted in bad faith in any way.

The Board ordered the reinstatement of the complainant and payment of compensation for lost wages and benefits equivalent to that which the complainant earned between the date of his termination and the date of his reinstatement less any amounts that he may have earned elsewhere and less the amount of the lump-sum payment he received in return for signing the release.

Cela étant dit, le redressement précis accordé à l'employé est laissé à la discrétion du Conseil qui tient compte de toutes les circonstances de l'espèce, y compris les circonstances dans lesquelles l'employé a signé une renonciation ainsi que la nature et la portée de la renonciation avant de décider du redressement qui est indiqué. Les allégations de mauvaise foi sont certainement pertinentes à cette décision, mais le Conseil n'a entendu aucun témoignage pouvant le convaincre que M. Sookoo a de quelque façon agi de mauvaise foi.

Le Conseil a ordonné la réintégration de M. Sookoo et son indemnisation pour perte de salaire et d'avantages sociaux équivalant à tout le salaire que le plaignant aurait touché entre la date de son congédiement et la date de sa réintégration moins tout montant qu'il aurait gagné ailleurs et moins la somme forfaitaire qu'il a reçue au moment de signer la renonciation.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Association of Postal Officials of Canada,

complainant,

and

Purolator Courier Ltd.,

respondent.

Board File: 17069 (745-5219)
CLRB/CCRT Decision no.1232
August 28, 1998

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, and Mr. Michael Eayrs and Ms. Roza Aronovitch, Members. Hearings were held on February 28 to March 3, 1996 and May 27 and 28, 1996, in Toronto.

Appearances

Mr. George Rontiris, counsel for the complainant, accompanied by Messrs. Arnold Sookoo, Ron Goodwyn, John Scherrer and Doug Porter;

Mr. Hugh Dyer, counsel for the employer, accompanied by Mr. Dirk Vandekamer, associate counsel, and Ms. Cheryl Ramsay, Human Resources Manager, Purolator.

I

On November 9, 1995, the Association of Postal Officials of Canada ("the association") filed a complaint pursuant to section 97(1)(a) of the Code alleging that Purolator Courier Ltd. ("the employer") contravened section 94(3)(a)(i) of the Code by dismissing Arnold Sookoo ("the complainant"). The complainant's employment was terminated on August 14, 1995 ostensibly for reasons of administrative reorganization.

II

The complainant was first employed by Purolator in October 1986 as an administrative clerk. During his nine years with the company he rose steadily through the organization and held various positions. In 1993, he was named unit manager and was in charge of 18 couriers, a post he still held at the time of his termination. In addition to these duties, the complainant was responsible for training new employees at his depot on Logan Avenue. He also occasionally performed human resources duties when the responsible person was absent and, on numerous occasions, made the decision to hire new employees. Mr. Sookoo viewed himself as an excellent employee. Indeed, as late as February 1994, the complainant received an impeccable evaluation.

In 1994, the employer began a cross-country restructuring operation in order to reduce its costs and increase its competitiveness. The planning of the downsizing commenced in the fall of 1994. This restructuring was partially implemented in January 1995 and was completed during the summer of that year. As a result, there was significant downsizing among middle-management in Ontario according to a minutely calculated plan.

For the purpose of the Logan Avenue Depot where Mr. Sookoo worked, the restructuring plan called for the elimination of two surplus unit manager's positions. Mr. Sookoo was one of the unit managers whose employment was terminated. The disposition of the other unit manager's position was through a subsequent transfer. Dana Christie, another unit manager at Logan, was transferred to Dartmouth in the fall of 1995.

It was Mr. Bill Henderson, Vice-President in charge of Ontario operations, who made the decision to terminate the complainant. Ms. Cheryl Ramsay from human resources

and Mr. Steve Eagan, the complainant's direct superior, were consulted but it was Mr. Henderson who made both the initial and the final decision. The input of Mr. Eagan and Ms. Ramsay was only required to confirm this decision.

According to Ms. Ramsay, she met with Mr. Henderson the week of July 24, 1995 and became acquainted with the fact that two unit managers positions had been identified as surplus at Logan and that Mr. Henderson had selected Mr. Sookoo as one of the unit managers whose employment was to be terminated as a result. It was decided by Mr. Henderson and herself that the date of the dismissal was to be August 7. In fact Mr. Sookoo was on holidays at that time. As a result, it was not until August 14 that Mr. Henderson, in the presence of Mr. Eagan, met very briefly with the complainant in Mr. Eagan's office and informed him that his position was abolished due to restructuring. No other reason was given for his termination. Following the interview, Mr. Henderson met the remaining unit managers at Logan to advise them that Mr. Sookoo's employment had been terminated, that the downsizing at the depot had been concluded and there would be no further lay-offs at the management level.

At the time the complainant's employment was terminated, he was offered a severance package conditional on his signing a standard form of release purporting to release the employer from any further liability flowing from the plaintiff's termination. He asked for an extension of the five-day limit to accept the offer. The employer denied this request but did accept to pay Mr. Sookoo his severance in the amount of \$15,152.00 in lump sum. Mr. Sookoo did not consult a legal advisor and on August 18 executed the release, which reads in part as follows:

" ***FULL AND FINAL RELEASE***

IN CONSIDERATION OF the payment or promise of payment or other agreements, as detailed in correspondence to ARNOLD

*SOOKOO from Purolator Courier Ltd., dated August 11, 1995, the sufficiency and receipt whereof by me is hereby expressly acknowledged, I, ARNOLD SOOKOO, do hereby remise, release and forever discharge Purolator Courier Ltd./Courier Purolator Ltee. and all of its affiliated and related companies and subsidiaries and their officers, directors, servants and agents (hereinafter collectively referred to as the 'Releasees') of and from all actions, causes of actions, demands, covenants, contracts and claims whatsoever which I ever had, now have or which I can, shall or may hereafter have existing up to the date hereof for or by reasons of any cause, matter or thing whatsoever, including without limiting the generality of the foregoing, any actions, cause of action, suits, demands or claims relating to my employment with any of the Releasees, and I hereby specifically covenant, represent and warrant to the Releasees that I have no further claim against the Releasees for or arising out of my employment or cessation of employment which specifically includes but is not limited to any claims for notice, pay in lieu of notice, wrongful dismissal, severance pay, bonus, overtime, interest, vacation pay or **any claims under the Canada Labour Code and the Canadian Human Rights Act.***

...

I HEREBY confirm that I have been afforded an opportunity to obtain independent legal advice with respect to the details of the settlement evidenced by this Release and confirm that I am executing this Release freely, voluntarily and without duress."

(emphasis added)

On August 21, 1995, Mr. Sookoo filed a complaint under Part III of the Canada Labour Code alleging unjust dismissal. The complainant did not allege anti-union animus on the part of the employer, but claimed that he was unjustly dismissed given that he had "a clean personnel file" and that the employer had neither criticized nor expressed any concerns about his performance or conduct.

III

Mr. Henderson explained why he had chosen to dismiss the complainant from among the unit managers at Logan despite Mr. Sookoo's evidently superior performance. The determining factor for Mr. Henderson was the complainant's negative attitude toward the company. He had developed "a strong if not malicious" criticism of management, which he openly communicated to fellow employees and managers. According to Mr. Henderson, the complainant was critical of the company's direction, the manner in which it was run as well as the matter of compensation.

Mr. Henderson pointed out that employees' attitudes were known to management and Mr. Sookoo was known to have a negative attitude. Mr. Henderson stated that he was already of that view as of 1993. In that connection, he relied on one specific incident of which he had personal knowledge and referred to as the "McCaw" or "hub incident." The incident took place in 1993-94, when according to Mr. Henderson the complainant had allegedly used coarse language in addressing Mr. McCaw, a senior manager at the Ontario hub, and had resulted in Mr. Sookoo being asked to apologize.

These were other examples, "though less severe." Mr. Sookoo had phoned Mr. Henderson on at least three occasions at various non-specified times to complain about training, compensation and the lack of adequate communication from management.

Mr. Henderson had not spoken to Mr. Sookoo about his attitude or disciplined him in any way. Instead, in an attempt to assist Mr. Sookoo, Mr. Henderson had arranged for the complainant to become involved in the corporate training program. Having found out from Mr. Eagan that Mr. Sookoo was interested in becoming a trainer for

new employees, Mr. Henderson had contacted Mr. M. Tilden, the director of training at head office, about establishing an in-house training program at Logan with Mr. Sookoo as trainer.

Mr. Tilden had not been favourable to the suggestion and expressed reservations regarding Mr. Sookoo, but Mr. Henderson prevailed on him to pursue the matter. Later in 1995, Mr. Henderson heard from Mr. Tilden, who had personally instructed the complainant in a five-day course, that Mr. Sookoo had caused some sort of disruption in the class. Upon learning this, Mr. Henderson had ordered an end to Mr. Sookoo's involvement in training.

According to Mr. Henderson, the training initiative had come about because Mr. Eagan had expressed concern to Mr. Henderson regarding the complainant's negative attitude. He and Mr. Eagan had hoped that Mr. Sookoo's involvement in the orientation and training of new employees would improve Mr. Sookoo's attitude. However, the initiative did not bear fruit. In June or July 1995, Mr. Eagan contacted Mr. Henderson to advise that Mr. Sookoo's attitude had worsened and was "having a negative impact on the whole building and causing managers to be wound-up." While his decision of July to terminate Mr. Sookoo was made independently, this confirmed for Mr. Henderson that he was right to choose the complainant for dismissal.

As to his knowledge of Mr. Sookoo's involvement in union activity, Mr. Henderson stated that on August 14 when he terminated Mr. Sookoo's employment, he was aware that there was some union organizing activity but not by whom. He had received phone calls during the week of August 7 from some district managers as well as unit managers to the effect that they had been contacted by union representatives outside of Purolator. However, he had not received any information regarding Mr. Sookoo and denied any knowledge that Mr. Sookoo was involved in union activity.

Mr. Eagan, the complainant's immediate supervisor, confirmed that Mr. Sookoo was a good worker. His concerns regarding the complainant's attitude had arisen in late 1994 with Mr. Sookoo's outspoken criticism of the corporation. Initially, he was not concerned by the complainant's criticism, but as it became more frequent and vocal he feared that it would adversely affect the morale of the team at the depot.

Mr. Sookoo had for example been openly critical of the corporation's gainshare program. In that regard, Mr. Eagan admitted that all of the managers had become frustrated and wondered if they would see their gainshare bonuses, but the complainant was apparently the most outspoken. Mr. Sookoo also complained that there was no real direction from higher management. While Mr. Eagan admitted he sometimes agreed with the complainant, his concern was that Mr. Sookoo would share such views openly with others in a manner that Mr. Eagan felt was unprofessional.

Mr. Eagan encouraged an open atmosphere at the depot and engaged Mr. Sookoo in friendly collegial conversation from time to time. He was not specifically critical of Mr. Sookoo's attitude nor disciplined him in any way. Mr. Eagan had however advised Mr. Sookoo with regard to his attitude and suggested that there would always be occurrences in the corporation that would be difficult to understand and everyone should therefore concentrate on their own direction and make the best of the situation. Mr. Eagan had also called a meeting of his managers to call attention to the importance of behaving professionally.

In April 1994, Mr. Eagan met with the complainant following a very positive performance review to discuss Mr. Sookoo's future direction in the company. Mr. Eagan wished to groom Mr. Sookoo to become a district manager. The complainant however expressed a preference for doing in-house training of new employees at the Logan depot. Accordingly, after consultation with Mr. Henderson, Mr. Eagan had directed Mr. Sookoo toward training hoping that this would keep

Mr. Sookoo fruitfully occupied and satisfied. This direction, which he and Mr. Henderson hoped would improve Mr. Sookoo's attitude, was launched in early 1995 at which time the complainant had received his own first session of training with Mr. Tilden.

Mr. Eagan explained that unfortunately this training initiative did not work. Mr. Sookoo did not stick it out or follow through with the training and he remained negative and dissatisfied.

Mr. Eagan was advised of the termination of Mr. Sookoo's employment a week before the termination date. His evidence was that he knew nothing of Mr. Sookoo's involvement with the union organizing drive at that time and that he supported Mr. Henderson's decision because he felt that the complainant was the weakest link in his management team.

Mr. Tilden's first contact with Mr. Sookoo was in the late 1980s when Mr. Tilden had instructed Mr. Sookoo in a training course for supervisors. Mr. Sookoo was apparently argumentative and critical of what was being taught as unrealistic for application in the workplace. Mr. Tilden's impression was that Mr. Sookoo lacked enthusiasm and did not have a positive and "upbeat" outlook on the corporation.

Mr. Tilden confirmed that, in the late summer and early fall of 1994, he was contacted by both Messrs. Henderson and Eagan with respect to creating an in-house training position at the Logan depot with Mr. Sookoo as the trainer. He had objected because the position was being created ad hoc. While there was an initiative to establish a forum to do orientation training in the field, Mr. Tilden thought what was being suggested by Messrs. Henderson and Eagan was an arbitrary process since there was no job posting. He also disagreed with the selection of Mr. Sookoo as a trainer. He concluded however that the decision had already been made and he undertook to carry

on with it. As a result, he attempted to arrange a meeting between himself, Mr. Wendt, also involved in training, and Mr. Sookoo. There was subsequently a good deal of difficulty in finding a meeting time that was suitable to Mr. Sookoo. Mr. Tilden felt that the complainant showed a considerable lack of flexibility in finding a time to meet with Messrs. Tilden and Wendt.

In March 1995, a full-time training position at head office became available. Mr. Sookoo contacted Mr. Tilden and enquired about the salary and other conditions of the job, including the amount of travel involved. When he had found out the amount of travel involved was substantial, Mr. Sookoo decided not to apply for the job. Mr. Tilden felt that training requires a great deal of flexibility, which Mr. Sookoo did not possess. In his view, the complainant did not have the proper enthusiasm for training since he had declined to compete for the full-time position.

Mr. Tilden's next encounter with the complainant was on the occasion of his instructing Mr. Sookoo in a five-day course on "Presentation and Facilitation Skills" in April or May 1995. At the end of the course, Mr. Tilden reported to Mr. Henderson that he had concerns regarding Mr. Sookoo. The course was evaluated through student and instructor criticism and students had been especially critical of Mr. Sookoo. Mr. Tilden had found that the complainant was not interactive in his approach and instead had a rigid lecturing style. He also stated that Mr. Sookoo put other students ill at ease and was viewed by them as arrogant. Mr. Tilden did provide some constructive criticism to Mr. Sookoo with regard to his teaching style, and Mr. Sookoo apparently showed some improvement as a result. At the conclusion of the course, Mr. Tilden felt that Mr. Sookoo's performance needed further improvement but was not so poor as to preclude him from training new employees. Mr. Henderson, however, having heard Mr. Tilden's comments on the claimant's performance had decided that Mr. Sookoo was not to do any further training as of that date. Mr. Tilden agreed.

IV

Having explained his work history at Purolator, Mr. Sookoo provided a chronology of some of the events alluded to by Messrs. Henderson and Eagan. The performance appraisal on which he had scored 96% and was signed by Mr. Eagan on February 25, 1994 related to the 1993 calendar year. He had met with Mr. Eagan in April 1995 regarding the appraisal, was asked to look at it and told by his supervisor that he was doing a fantastic job and that he should keep up the good work. Among the elements specifically identified on the evaluation are the ability "to establish a mutual feeling of respect with employees," "to accept, communicate new directions in a positive manner" and to "demonstrate leadership through professional manner". Mr. Sookoo was rated at the highest in each of these areas.

Following the discussion of his performance review. They discussed what Mr. Sookoo would like to do. Mr. Sookoo confirmed Mr. Eagan's suggestion that Mr. Sookoo should become district manager. Mr. Sookoo however preferred to be involved in training and development. He had previously been a school teacher and liked the fact that Purolator was moving in the direction of training all incoming employees. He understood that Mr. Henderson favoured the establishment of a full-time in-house trainer position for his region and hoped to occupy such a position when it was established. Messrs. Henderson and Eagan had acted on his request and, as a result, he received his first five-day "Employee Orientation Train the Trainer" course in July 1994, following which he was issued a certificate. Mr. Tilden had himself dropped in during the course of the five-day program but was not the instructor of the course. Thereafter, further to discussions with Messrs. Eagan and Henderson, Mr. Sookoo had set up his own in-house training at the Logan street depot and offered

orientation courses to incoming employees the first of these being two sessions in October and November 1994. He was still involved in training in June 1995.

In addition to training, in June 1994, the complainant took on the duties of the Human Resources Manager who was on leave. In September 1994, he was asked by Mr. Eagan to take on the selection and recruitment of staff for the Logan and the nearby Worth Street facility including clerical, operational staff and couriers. He hired some 15 or 16 people in that capacity and retained this responsibility to the date of his termination. He felt that he ought to receive additional remuneration for the human resources work he was doing in addition to his unit manager's responsibility and admitted making that point to his supervisors.

Mr. Sookoo had also complained that the corporation was dragging its feet on instituting the full-time position of in-house trainer. He recalled doing so to Ms. Ramsay when they had met at the beginning of July 1995.

According to Mr. Sookoo, the gainshare program was instituted for a six-month period from June 1994 to December 1994. Unit managers were rewarded based on meeting certain productivity standards. Mr. Sookoo through his efforts became entitled to close to the maximum bonus, but he and other unit managers did not receive payment until April 1995. In the interim, unit managers were advised by Mr. Eagan that there was some chance that the payments might not be made at all. The managers were understandably disappointed and frustrated. Many, including Mr. Sookoo, complained to Mr. Eagan and the matter was openly discussed in groups of unit managers during breaks.

Mr. Sookoo was surprised and stung by the termination of his employment. On Friday, August 18, quite shaken, he spoke to Mr. Henderson to tell him that he had not expected this and needed more time. Mr. Henderson referred him to Ms. Marie

Wallace. The complainant spoke to her explaining that he needed more time to see a lawyer. Ms. Wallace responded that his salary continuation would be cut off if she did not receive a signed copy of the release. Mr. Sookoo did not see a lawyer; he signed and sent the release to Ms. Wallace that very day by facsimile. The reason he gave was that he had two children to support.

Mr. Sookoo admitted having read the release and acknowledged having five business days to see a lawyer. He denied however having been told by Ms. Wallace that he could not sue Purolator. Mr. Sookoo's evidence was that he told Ms. Wallace that he did not understand the release but was signing it in any case. Subsequently, the complainant again spoke to Ms. Wallace to negotiate a lump-sum payment. He found out that Ms. Wallace had not received his facsimile of the 18, thus on August 22 he faxed her a new copy of the release dated August 18.

The complainant explained that he was extremely distressed by his sudden dismissal and felt he had been unjustly terminated. He lodged his complaint under Part III of the Code out of frustration but did not pursue it. He did not seek alternate employment between August 14 and October 1995. In October, he took up new employment with another courier company albeit at a lesser salary.

V

According to the union's evidence, a campaign to unionize Purolator's unit managers was being planned early in 1995. Indeed, Mr. Sookoo had contacted the union as of January 1995. At the time, however, the union's constitution did not allow it to organize outside the postal service and had to be amended to cover the employer's operations. Until this was done, the complainant was instructed to keep a low profile.

The constitution was amended at the union's convention that took place on June 27, 28 and 29, 1995. The union officer, Mr. Goodwin, contacted the complainant on July 10, 1995 and informed him that he need no longer maintain a low profile and should begin contacting as many employees as possible in order to prepare them for the coming organizing drive. The complainant's efforts to unionize the workplace thus began in earnest thereafter. According to his evidence, he spoke to approximately 20 unit managers from that date to the time he went on holidays on August 7 and put them on notice that union organizers would be contacting them shortly. On or around August 8, the union organizers began signing up members. The complainant signed his own card on July 26.

VI

THE EMPLOYER'S POSITION

The employer argues that it has met its onus pursuant to section 98(4) of the Code to show that anti-union animus played no part in its decision to terminate the complainant's employment. In the alternative, even if it has not met this burden, there is no remedy available to the complainant because he has released the company from all obligations flowing from his termination. Furthermore, even if the complainant is entitled to a remedy, he has failed to mitigate his damages.

In the employer's view, it presented uncontradicted evidence that the company was planning downsizing of middle management from the fall of 1994, which was partially implemented in January 1995 and was completed during the summer of that year. The complainant was chosen for two reasons. First, according to the ideal ratio of managers to employees, the Logan depot had two surplus unit managers. Second,

from among the unit managers at the Logan depot, the complainant was chosen for termination because of his extremely negative attitude towards the company, while another unit manager transferred to another region.

The employer maintains that the evidence demonstrates that a number of managers were terminated in the summer of 1995 and not only Mr. Sookoo. Further, the decision to terminate the complainant was made in July, at least two weeks before the official start of the organizing campaign and that it presented uncontradicted evidence that there was no company knowledge of the campaign. Finally, the employer argues that though it was alleged, the union did not present any evidence of threats indicating anti-union animus on the part of the employer. On the contrary, according to the employer's uncontradicted evidence, the company assured other unit managers following the complainant's termination that there would be no further job losses.

With respect to the release, the employer maintains that the complainant read the release and there can be little doubt that he knew exactly what he was signing. He was under no duress and was even able to negotiate a lump-sum payment before filing the complaint. That the complainant signed the release, accepted the lump-sum payment, and then filed this complaint and a complaint pursuant to Part III of the Code with Labour Canada is evidence of the complainant's bad faith.

The effect of this release at common law is to release the employer from all obligations flowing from the complainant's employment and the employer argued that similar results should obtain under the Code. While it is true that the release does not defeat the statutory right and that no party may contract out of the Code, at the very least, the complainant should be prevented from receiving a remedy because to do so would be to reward the complainant's bad faith. Similarly, the complainant should be denied a remedy because he failed to mitigate his damages until October 1995 and thereafter was working for another employer.

VII

THE UNION'S POSITION

The union submits that the employer has not discharged its burden pursuant to section 98(4). The union does not disagree that the employer significantly downsized its operations at the relevant periods and that middle management was the specific target of these measures. However, it submits that the employer has not justified choosing the complainant for termination.

Mr. Bill Henderson, vice-president in charge of Ontario operations, was the controlling mind in the decision to terminate the complainant. He could point to only one specific incident indicating that the complainant had a negative attitude. This incident, referred to as the "McCaw" or "hub incident," took place in 1993-94 and predated the complainant's positive evaluation. Indeed, the evaluation is in direct contradiction with Mr. Henderson's evidence as to the complainant's attitude and interpersonal skills.

Similarly, Mr. Eagan never had the occasion to single out or criticize the complainant for his negative attitude. Mr. Eagan in fact wanted the complainant to become a district manager. Most importantly, the union submits, how could the complainant be kept in training, dealing with new employees, when he is supposed to have such a negative attitude. In sum, the union recognized that the complainant is a little rough around the edges. That however was his style, and had never posed a problem before. Mr. Sookoo rose steadily through the ranks for nine years and all of a sudden he was labelled as having an attitude problem. The weight of the evidence thus indicates that

the complainant's rather brusque style was a pretext to fire him when it became known that there was a campaign to unionize the unit managers and that the complainant was involved.

For the union, the timing of the measure clearly supports this thesis. Mr. Henderson and Ms. Ramsay stated that the decision was made in July. Mr. Eagan, his immediate supervisor, testified that he did not know about it until August 9 or 10 while Ms. Ramsay's evidence is inconclusive. The complainant had been secretly organizing for several weeks prior to August 8, when the union became actively involved. The inference for the union is unmistakable that when Mr. Henderson found out about the organizing drive on August 8, he immediately decided to terminate the complainant.

With respect to the release, the union submitted several arguments. First, it was submitted that the complainant had no choice but to sign the release or find himself without any income. This amounts to duress, which vitiates the complainant's consent or is unconscionable in the common law parlance. Second, the release has no effect on the complainant's statutory rights. The union has carriage of this complaint before the Board; it never waived its rights. And, in any case, the reference to the Canada Labour Code in the release is a reference to Part III of the Code dealing with unlawful dismissal. Third, with respect to mitigation, the union argues that where a violation is found, the normal rules of mitigation apply.

VIII

It is appropriate to deal first with the question of the release. We begin by reiterating that both counsel agreed that a release does not constitute a bar to a complaint under

Part I of the Code. Rather they took the position that the release goes to remedy and made submissions in that regard.

The Board finds that the release signed by Mr. Sookoo is ineffective to cover recourses under Part I of the Code. The reference in the text of the release to such recourses is broad and ambiguous. It is not clear whether the release was intended to apply to recourses under all parts of the Code or only to recourses under Part III. This is a standard form release, the terms of which, in the Board's view, should be interpreted restrictively against its author. Where moreover the terms are vague, the Board may take extrinsic evidence into account in interpreting its language. In the circumstances of this case, the same release was used for other employees terminated by the employer and no provision was changed to fit the complainant's circumstances. None of the terminated employees were unionized and the terms and conditions of their employment including termination are covered by Part III of the Code. We conclude that the intent of the employer, judged objectively, was to exclude recourses for wrongful dismissal at common law and under Part III of the Code only and that a waiver of the complainant's rights under Part I was not contemplated by either party.

Moreover, we are satisfied from the evidence that Mr. Sookoo did not set his mind to or understand the nature of the rights he might be waiving under the Code, much less under Part I. He also did not have the benefit of counsel to interpret or explain the effect of the release or the references to the Code. Having found out that he could not secure an extension of time without jeopardizing his immediate source of income, he hastily signed and submitted the release. There is no doubt that in these circumstances the waiver is not effective as the complainant's was not an informed consent to the release of rights under Part I of the Code.

However, even if the Board had found that the parties had intended with full knowledge to exclude a recourse under Part I, the Board would still have found that

the release, even if otherwise valid, cannot preclude the Board from hearing a complaint filed pursuant to section 94(3) of the Code.

There is no doubt that the employer is entitled to certainty and finality in its contractual relations with employees. However, the recourses that are provided by section 94(3), in conjunction with other related provisions of Part I of the Code, take the matter outside the statutory and common law structures that govern the contractual aspects of employment. They provide a complete and separate recourse aimed at protecting the person's right of association and facilitating the free formation of trade unions. See United Last Company Ltd. c. Tribunal du travail et Adamowicz, [1973] R.D.T. 423 (C.A.), affirmed in Lafrance et al. v. Commercial Photo Service Inc., [1980] 1 S.C.R. 536; and Adam v. Daniel Roy Ltée, [1983] 1 S.C.R. 683.

At common law, if a contract of employment does not provide otherwise and except for certain special legislations, an employer may terminate an employment contract when it wishes, provided that the appropriate notice is given: see Wallace v. United Grain Growers Ltd., no. 24986, October 30, 1997 (S.C.C.). However, this contractual relationship between an employee and an employer during a union organizing drive is varied by the protection enacted under section 94(3)(a) of the Code. The employer is no longer free to amend, as it wishes, the terms of the contract. In fact, section 94(3)(a) states that the employer cannot "discriminate against any person with respect to employment, pay or any other term or condition of employment."

Furthermore, section 94(3)(b) provides that an employer cannot

"... impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part; ..."

These provisions clearly indicate the legislator's intent to restrain the employer's ability to amend a term or a condition of employment, including termination, when an employee exercises a right conferred by Part I of the Code and particularly when employees legitimately exercise their right of association. The release is certainly part of the termination process.

The requirements of the Code are such that when employees allege that the terms and conditions of their employment were amended because of the legitimate exercise of rights confirmed by the Code, failing settlement of the complaint, section 98(1) requires the Board to "hear and determine" the complaint. The language of the section is clear and mandatory as distinguished from similar labour code provisions in other jurisdictions, for example Ontario. The complaint itself then triggers the statutory duty of the employer to demonstrate that its actions are in no way motivated by anti-union animus.

It would frustrate both the purpose and intent of the legislator if the employer, whose actions encompass the securing of the release, may preclude the Board from hearing the complaint by virtue of a release that may itself be tainted. In that regard, the objects of the Code, which include the fostering of "sound labour and management relations" and "constructive collective bargaining practices," are not served if a release is allowed to bar a complaint irrespective of the employer's conduct. Those objects as well as the employer are best served where the employer's conduct is found to be unimpeachable and the complaint is dismissed.

Moreover, we recall that section 94(3)(a) aims to sanction collective rights as well as individual rights. A vital interest sought to be protected by the Code is the establishment of a trade union free from interference. In that regard, it has long been recognized by labour relations boards that the dismissal of a union organizer has a direct and chilling impact on an organizing campaign because it conveys a message to

others that they ought not to join a union. Section 97(1) of the Code recognizes this fact by providing that any person or organization may bring a complaint to the Board pursuant to section 94(3)(a). Here, for example, the complaint was brought by the union not by the individual. In our view, a release signed by an individual cannot waive collective rights and preclude the union's right of action; accordingly, in light of the objects and purposes of the Code, it does not constitute a bar to a complaint under Part I of the Code.

The employer argues that, while the release cannot serve to prevent the complainant from bringing an action under the Code, it should nonetheless bar the complainant from receiving a remedy. The Board does not understand the employer to argue simply that the complainant is not entitled to a remedy because he has already been fully compensated by the employer for his losses, but rather that by signing the release that is presumably otherwise sufficient and valid, the complainant has waived any right to a remedy. The employer further argues that, in any event, the complainant should be denied a remedy from the Board because he is clearly in bad faith. Evidence of the complainant's bad faith would include the manner in which the release was signed and negotiated.

Given the Board's finding as to the insufficiency of the release, it is not necessary to deal here with the employer's first contention that a validly signed release necessarily constitutes a waiver of any remedy to which an individual may be entitled.

That being said, the specific remedy that is afforded to the employee is a matter of Board discretion and the Board will take all the circumstances of the case into account, including the circumstances under which the employee has signed a release and the nature and scope of the release before deciding upon the appropriate remedy. Allegations of bad faith are certainly relevant to this determination, but the Board heard no evidence to convince it that the complainant acted in bad faith in any way.

IX

The legal principles that govern allegations of unfair labour practice pursuant to sections 94(3), 97 and 98(4) are well known. The employer must satisfy the Board either that there has been no sanction or that anti-union animus was not a proximate cause for the sanction (D.H.L. International Express Ltd. (1995), 99 di 126 (CLRB no. 1147); Atomic Transportation System Inc. (1995), 99 di 43 (CLRB no. 1136); National Pagette (1991), 85 di 1 (CLRB no. 862); Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473)). Where the Board has no clear evidence that the employer knew of the union activity or the complainant's part in it, it must rely on its assessment of the circumstances as a whole (Carbec Inc. (1985), 62 di 127 (CLRB no. 528)). For the reasons that follow, the Board is not satisfied that the employer has discharged its burden.

The complainant testified in a straightforward manner and without contradiction. The testimony of the employer's witnesses, on the other hand, appeared to the Board to be imprecise and contradictory on some issues. Some of the employer's witnesses had difficulty in being precise concerning the chronology and details of events on which they relied.

Mr. Tilden's concerns as expressed to Mr. Henderson's regarding the complainant's unsuitability for training were made on the basis of one encounter in 1988 when Mr. Sookoo had been critical of material taught by Mr. Tilden. Mr. Tilden's testimony regarding his and Mr. Wendt's difficulties in being able to meet with Mr. Sookoo was contradicted by the complainant who testified that there had been no such difficulty. Mr. Tilden did not appear to know or recollect that the complainant had not only successfully met with Mr. Wendt, but had subsequently taken a five-day training course in the summer of 1994, which culminated in the presentation of a

certificate followed by Mr. Sookoo carrying out two dock-side orientations for incoming staff at Logan in the fall of 1994.

Notwithstanding Mr. Henderson's instructions to Mr. Tilden that Mr. Sookoo no longer do any training, the complainant had continued to be involved in hiring and orientation activities in addition to carrying on with his unit manager responsibilities almost to date of his termination, a fact that did not appear to be clear to Mr. Tilden. Mr. Sookoo also denied that there had been any disruption in Mr. Tilden's class and that criticism of his performance by other students was particularly negative.

Mr. Henderson testified that he based his decision on the fact that the complainant had a bad attitude toward the company. He founded his opinion chiefly upon his knowledge of the so-called "hub incident" that occurred sometime previously for which the complainant was never reprimanded. Mr. Henderson's version of what had transpired at the "hub" was flatly contradicted by Mr. Sookoo who admitted to having to apologize for Mr. Henderson's sake, but denied ever having addressed foul language to Mr. McCaw. Mr. Sookoo explained that quite to the contrary, it had been Mr. McCaw who had insulted him. Mr. Eagan, for his part, had no knowledge of the alleged conduct and did not in any way corroborate Mr. Henderson's version of the facts.

As for Mr. Sookoo's outspoken criticism of the company, Mr. Henderson recalled some telephone conversations in that regard but was vague about the criticism allegedly levelled at the company. These were left for Mr. Eagan to flesh out. For his part, Mr. Eagan could only recall the items admitted to by the complainant: resentment along with other unit managers regarding the non-payment of the gainshare bonuses; requests for higher remuneration to reflect his having assumed certain human resources functions; complaints to Ms. Ramsay that the company was dragging its feet in instituting a full-time in-house training position. Mr. Eagan did not however provide

any particulars of other criticism of the companies' policies or direction made vocally to other management such as to undermine the team morale at Logan.

On the whole, the Board finds the evidence of the complainant is to be preferred to that of the employer. This finding is particularly important with respect to the employer's treatment of the complainant in the months of July and August 1995. The Board has no direct evidence that the employer knew of the union's activities, but from the totality of the evidence, and notably from the circumstances outlined below, the Board finds that the employer acted out of anti-union animus when it terminated the complainant's employment.

The complainant began organizing his colleagues in earnest in July after he was informed that the union's constitution had been amended. In clear and credible fashion, the complainant explained how he contacted approximately 20 fellow managers toward the end of July. He was not simply involved in an organizing drive, he was the chief and only organizer from among the employees.

Much was made of the complainant's temperament. The employer in fact based its entire case on the complainant's alleged attitude problem. The Board has no difficulty in accepting that the complainant's personality could be found to be abrasive by some. It is clear, however, that such has been the case since the beginning of his tenure at Purolator. The complainant was a hard-driving production unit manager who did not mince words. There was uncontradicted evidence that he offended other employees with whom he had passing contact. However, no reproach was ever made to him by management, and temperament problems did not stop the complainant from rising steadily through the ranks. Mr. Sookoo's superlative evaluation is in fact in direct contradiction with evidence as to the complainant's attitude and interpersonal skills evident even at the date of the evaluation.

Prior to the summer of 1995, the complainant had consistently been promoted within the organization and without exception had always received positive feedback. The complainant's direct superior wanted the complainant to become a district manager. The complainant declined the possibility but expressed his interest in training. This request was honoured by the employer and the complainant was given instruction in training. This initiative was launched the summer of 1994 and was consistent with the employer recognizing and rewarding a valued employee rather than an initiative to "turn about" a problem employee. Indeed, Mr. Eagan's concerns regarding an attitude problem apparently arose late in the fall of 1994. This would have coincided with Mr. Sookoo's vocal criticism of management over the payment of gainshare bonuses. The evidence indicates that Mr. Sookoo was already launched in his training initiative with the help of Messrs. Henderson and Eagan, long before Mr. Eagan would have thought that remedial action was appropriate in respect to Mr. Sookoo's attitude. Indeed, Mr. Sookoo not only confirmed that he had never been rebuked or disciplined for his attitude, he was unable to recall any conversation in which the issue was raised including the advice allegedly received from Mr. Eagan to set his mind to his own direction instead of being critical of the corporation's.

Mr. Eagan was aware that Mr. Sookoo wanted to see a training program established at Logan. When Mr. Sookoo declined to take the training job at head office due to his family obligations, Mr. Eagan construed this as a failure to carry through and a loss of enthusiasm for training. This notwithstanding that, at the time of his termination, one of the complainant's responsibilities remained the training of new employees within his group. It is strange that the employer would choose to terminate a highly productive unit manager with nine years seniority as opposed to a less productive or more recently hired member of its workforce. It is incomprehensible to us how an individual with such a negative attitude toward the company could be left in a position where he would be hiring and training new employees. These circumstances, coupled with the singularly appropriate timing of the termination, make it difficult not to

conclude that the employer knew of the complainant's union activities and acted in consequence.

The Board is similarly not satisfied that the decision to terminate the complainant took place in July. All documentary evidence pointed to the decision being made in August. Ms. Ramsay's evidence that she met with Mr. Henderson during the week of July 24 was vague. Mr. Eagan, the complainant's immediate supervisor, testified that he did not hear of the decision until August 9 or 10, that is directly after the organizing drive became common knowledge. The Board can only infer from the circumstances that the decision was made closer to these dates, well after the complainant began organizing in earnest and at the same time as the official start of the organizing drive.

In conclusion, given the totality of the circumstances outlined above, the Board is not satisfied that anti-union animus played no part in the decision to terminate the complainant. While there was no direct evidence of the employer's knowledge of union activity, the circumstances are such that the Board finds that the employer in fact knew of the complainant's activity when it terminated his employment. From the overall coincidence of circumstances, moreover, the Board finds that anti-union animus was the determining factor in the employer's decision to terminate the complainant; the complainant's "negative attitude" was a mere pretext and explanation after the fact.

The Board therefore finds that the employer has violated section 94(3)(a)(i) by terminating the complainant's employment because of the complainant's union activity and that the complainant is entitled to a remedy.

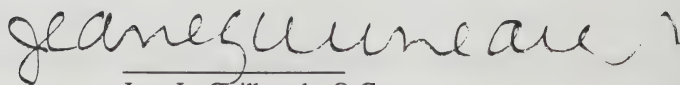
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The usual remedy in cases where an employer has violated section 94(3)(a) is reinstatement pursuant to section 99(1)(c). There are no circumstances that would

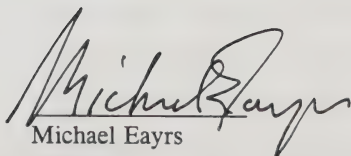
convince the Board to deviate from this policy in the present case. The employer is therefore ordered to reinstate immediately the complainant in his employment. The complainant is under no obligation to mitigate his damages; however, any sums that he has in fact earned will be subtracted from the compensation (Victoria Flying Services Ltd. et al. (1979), 35 di 73; and [1979] 3 Can LRBR 216 (CLRB no. 199); and Larose Paquette Autobus Inc. (1992), 87 di 139; and 92 CLLC 16,064 (CLRB no. 924)). In addition, therefore, the employer is ordered to pay to the complainant compensation for lost wages and benefits equivalent to that which he would have earned between the date of his termination and the date of his reinstatement less any amounts that the complainant may have earned elsewhere and less the amount of the lump-sum payment he received in return for signing the release.

The Board appoints Mr. Peter Suchanek, Regional Director and Registrar, Ontario Region, to assist the parties in implementing the foregoing orders.

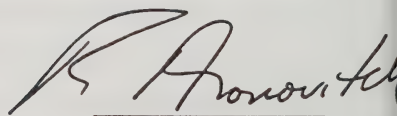
The Board shall remain seized of these matters in order to determine any questions that may arise with respect to the foregoing orders, and the implementation of the same.



Jean L. Guilbeault, Q.C.
Vice-Chair



Michael Eayrs
Member



Roza Aronovitch
Member

information

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Summary

International Brotherhood of Locomotive Engineers, *applicant*, and VIA Rail Canada Inc., *respondent employer*, and United Transportation Union; National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); and Canadian National Railway Company, *interested parties*.

Board Files: 18666-C and 18688-C
CLRB/CCRT Decision no. 1233
July 20, 1998

Application pursuant to section 92 of the Code for a declaration of an illegal lock-out. The International Brotherhood of Locomotive Engineers alleges that VIA's decision to apply the "crewing initiative" job assignment procedures to the conductors and assistant conductors during the freeze period amounts to a lock-out contrary to section 92 of the Code. Application granted.

VIA argues that the effect of a previous decision of the Board to consolidate the locomotive engineers unit and the conductors was to constitute a new bargaining unit with respect to which no collective agreement was applicable. As the result of the certification order of the union as the bargaining agent for this new unit, the previously existing collective agreements affecting the employees in the new defined bargaining unit and assistant conductors was no longer applicable, and the

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Résumé

Fraternité internationale des ingénieurs de locomotives, *requérante*, et VIA Rail Canada Inc., *employeur intimé* et Travailleurs unis des transports; Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada) - (CTC) et, Compagnie des chemins de fer nationaux du Canada, *parties intéressées*.

Dossiers du Conseil: 18666-C et 18688-C
CLRB/CCRT Décision n° 1233
le 20 juillet 1998

Demande formulée en vertu de l'article 92 du Code pour obtenir une déclaration de lock-out illégal. La Fraternité internationale des ingénieurs de locomotives soutient que la décision de VIA d'appliquer les procédures d'attribution du travail appelée « l'initiative relative à la constitution des équipes » aux ingénieurs et aux ingénieurs adjoints au cours de la période de gel équivalait à un lock-out en contravention de l'article 92 du Code. La demande est accueillie.

VIA fait valoir qu'une décision antérieure du Conseil de grouper les mécaniciens et les ingénieurs de locomotives a eu pour effet de constituer une nouvelle unité de négociation à laquelle aucune convention collective ne s'applique. Par suite de l'ordonnance accréditant le syndicat comme agent négociateur de cette nouvelle unité, les conventions collectives qui régissaient auparavant les employés de la nouvelle unité de négociation et les ingénieurs adjoints ne



freeze of their content provided in subsection 50b) would therefore not apply in the instant case.

The Board finds that where a union is certified as the bargaining agent of a consolidated bargaining unit, the union, pursuant to section 36(1)c) of the Code, is substituted as a party to any collective agreement applicable to the employees in the bargaining unit. The Board finds that section 36(1)c) receives application whether the substitution of the bargaining agent occurs in the context of the successor rights provisions of sections 43 to 46 or in the context of a bargaining unit consolidation pursuant to section 18 of the Code.

The notice to bargain given to VIA pursuant to section 49 of the Code prior to the consolidation of the two bargaining units, remained in effect after the issuance of the certification order and the freeze provision of 50b) remained applicable with respect to the terms and conditions of the existing collective agreements.

Since the requirements of section 89(1)(a) to (d) have not been met when VIA decided to implement its "crewing initiative", the Board declared that such decision was an unlawful lock-out and a violation of the the freeze provisions of section 50b) of the Code.

s'appliquent plus, et le gel des modalités de ces conventions prévu au paragraphe 50b) ne s'applique donc pas en l'instance.

Le Conseil conclut que lorsqu'un syndicat est accrédité comme agent négociateur d'une unité de négociation regroupée, ce syndicat, en conformité avec l'alinéa 36(1)c) du Code, est substitué en qualité de partie à toute convention collective s'appliquant aux employés de l'unité de négociation. Le Conseil conclut que l'alinéa 36(1)c) s'applique, que la substitution de l'agent négociateur se fasse dans le contexte des dispositions des articles 43 à 46 portant sur les droits du successeur ou dans celui du groupement d'unités de négociation aux termes de l'article 18 du Code.

L'avis de négociier transmis à VIA aux termes de l'article 49 du Code avant le groupement des deux unités de négociation reste en vigueur après que l'ordonnance d'accréditation a été rendue et les dispositions sur le gel des modalités prévues au paragraphe 50b) continuent de s'appliquer aux conventions collectives existantes.

Étant donné que VIA n'a pas rempli les conditions énoncées aux alinéas 89(1)a) à d) lorsqu'elle a décidé de mettre en œuvre « l'initiative relative à la constitution des équipes », le Conseil a déclaré que cette décision constituait un lock-out illégal et une violation des dispositions sur le gel prévues au paragraphe 50b) du Code.

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LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

International Brotherhood of Locomotive Engineers,

applicant,

and

VIA Rail Canada Inc.,

respondent employer,

and

United Transportation Union; National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); and Canadian National Railway Company,

interested parties.

Board Files: 18666-C and 18688-C
CLRB/CCRT Decision no. 1233
July 20, 1998

The Board was composed of Mr J. Paul Lordon, Q.C., Chairman, as well as Mr. Michael Eayrs, and Ms. Roza Aronovitch, Members. A hearing was held on April 16, 1998 and April 20, 1998, at Montréal, Quebec.

Appearances

Mr. James L. Shields, assisted by Mr. Gilles Hallé, for the applicant;

Ms. Louise Béchamp and Mr. Jean H. Lafleur, Q.C., assisted by Mr. Bannon E. Woods, for the respondent employer;

Mr. Michael A. Church, for the United Transportation Union;

Mr. Abe Rosner, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada); and

Mr. John Coleman, for the Canadian National Railway Company (attended part of proceedings only).

These reasons for decision were written by Mr. J. Paul Lordon, Q.C., Chairman.

I

The present matter actually commenced when the International Brotherhood of Locomotive Engineers (hereafter BLE) sent a letter to the Minister of Labour seeking consent to file a complaint with the Board pursuant to section 97(3) for an alleged failure to comply with section 50(b) of the Canada Labour Code on January 19, 1998. On March 25, 1998, the Minister of Labour consented to the complaint being made to the Board by the BLE against VIA Rail Canada Inc. (hereafter "VIA" or "the employer"). The Minister's consent dealt with a complaint by the BLE that the respondent employer, VIA, had failed to comply with sections 50(a) and (b) of the Canada Labour Code by altering the applicable terms and conditions of employment without the requirements of sections 89(1)(a) to (d) of the Code having been met and without the consent of the complainant being obtained.

The original consent of the Minister also dealt with a complaint pursuant to section 50(a) of the Code of failure by VIA to bargain collectively in good faith and to make every reasonable effort to enter into a collective agreement. However, with the consent of the parties, and in consideration of the urgency of the present matters, this portion of the BLE's complaint was deferred and reserved for further hearing, if necessary.

The urgency resulted from an initiative by VIA identified as the "crewing initiative". The so called "crewing initiative" resulted in a further application by the BLE

pursuant to section 92 of the Code alleging that the employer's actions amounted to a lockout contrary to that section.

With the consent of the parties, the bad faith bargaining complaint being deferred, the Board proceeded to hear those elements of the complaint relating to the alleged violation of the freeze provisions of the Code and the alleged unlawful lockout. It was alleged that an unlawful lockout had resulted when certain conductors and assistant conductors were requested by the employer to follow its newly introduced "crewing initiative" job assignment procedures rather than the "Crew Consist" provisions of the collective agreements then in force.

In the result, the Board issued an order on April 23, 1998, in which it declared pursuant to section 92 of the Code that the respondent employer had declared or was about to declare or cause a lockout of the conductors and assistant conductor members of the complainant's bargaining unit through the implementation of the so called "crewing initiative", during the freeze period. The Board ordered that the conductors and assistant conductors be permitted to exercise their duties in accordance with the "Crew Consist" provisions of the applicable collective agreements. The effect of the Board's orders was limited to eight weeks to allow the parties to promptly and expeditiously enter into negotiations with a view to concluding a new collective agreement to inter alia address the matters in dispute. These Reasons for Decision set out the basis for the issuance of the Board order of April 23, 1998.

During the course of the present proceedings, two witnesses testified before the Board. Mr. Gilles Hallé, Canadian Director and International Vice-President of the Brotherhood of Locomotive Engineers, gave evidence on behalf of the BLE. Mr. Bannon E. Woods, Director of Human Resources and Labour Relations for VIA, testified on the employer's behalf. While their evidence provided considerable insight, the substance of the present complaint may be quite easily discerned from

the content of the 25 exhibits that were submitted to the Board's attention in the present proceedings.

Among these exhibits, Exhibit 10 most graphically highlights the difficulties that arose. It is useful to quote in its entirety the text of this Exhibit, which is a letter dated December 16, 1997 from Mr. Bannon E. Woods to Mr. Hallé.

"Dear Sir:

In response to your request for clarification of the letter forwarded to your solicitors dated December 10, 1997 from our solicitor Louise Béchamp, our position is as follows:

1. The former Collective Agreements are defunct as of October 31, 1997.

2. The Corporation and the BLE have an obligation to negotiate the new collective Agreement. The Corporation is prepared to do so.

3. The Corporation reiterates its willingness to discuss the terms and conditions of the crewing initiative with the BLE; however, failing agreement, the Corporation will implement the crewing initiative on its own terms and conditions by the latest April 1, 1998.

4. If you require further explanation of the affects of the Section 18 ruling you should review the matter with your solicitor.

5. At this point the Corporation does not intend to change the working conditions for the running trades at VIA Rail save and except the crewing initiative and changes that may occur in the ordinary course of business. This does not mean that the Corporation is restricted from adding, removing or changing demands in the National Negotiations."

The text of this letter requires some explanation. According to the employer, the former collective agreements were defunct as a result of a decision of the Board in file 530-2634 (VIA Rail Canada Inc. (1997), 104 di 67; and 38 CLRBR (2d) 124 (CLRBR no. 1206)), a decision of the panel of the Board consisting of Mr. J.F.W.

Weatherill, then Chairman, and Mr. Michael Eayrs and Ms. Véronique Marleau, Members. In that decision dated September 22, 1997, the present employer respondent had applied pursuant to section 18 of the Code seeking a review of certain certification orders issued by the Board. The certification orders that were reviewed were those for VIA Rail's running trade employees. Those bargaining units were: a Locomotive Engineers Unit and a Conductors Unit. The Locomotive Engineers Unit had been represented by the BLE. The Conductors Unit, consisting of conductors, assistant conductors and yardmen, had been represented by the United Transportation Union (hereinafter UTU). In the cited matter, the employer had requested that the Board abolish the two separate classifications of "locomotive engineer" and "conductor". To allow this to occur, it was proposed, under section 18 of the Code, to create a new single bargaining unit that would replace the former two, and thus permit the establishment of a single classification of "operating engineers", which would merge the two formerly separate occupational categories.

The Board then ordered a secret vote to determine, if the application was granted, whether the BLE or the UTU would represent the new merged unit. The Board then determined that a single bargaining unit replacing the former two units was indeed appropriate and the vote was counted. The BLE was successful in the vote, although narrowly, and became the sole bargaining agent for the new unit that consisted of the former job categories of engineers, conductors, assistant conductors and yardmen. These classifications were to be collapsed and merged to a new, single "operating engineer" category.

In this respect, the previous panel had this to say:

"... If the employer implements the proposed single running trades classification, as it is open to it to do, and as it has announced it will, then clearly all employees in that classification would have

a community of interest for collective bargaining purposes, and they would all appropriately be included in the same bargaining unit."

(pages 70; and 126-127)

The principal difficulty in the new arrangement, which was noted by the previous panel, is set out as follows:

"... At present, while all members of the engineer unit would be qualified to perform the contemplated functions of the combined classification of 'operating engineers,' it was established that only 5% of the members of the conductors unit would be so qualified."

(pages 69; and 126)

In addition to the serious difficulty encountered in qualifying individuals for positions in the new bargaining unit, there were a number of other problems. With the proposed change in operating categories envisaged by the employer, fewer employees would be required, and there would be an inevitable reduction in the number of members in the new bargaining unit. Obviously, the structure proposed by the employer would disadvantage the former conductors and assistant conductors when and if the proposed single running trades classification was implemented.

Considerable evidence was adduced before the Board relating to the situation that led the employer to undertake the consolidation of the identified running trades. Suffice it to say that the employer, which is in receipt of a subsidy from the government of Canada, is under pressure to significantly reduce its reliance on the government subsidy within a relatively short period of time.

Following the counting of the vote to determine which bargaining agent between the BLE and the UTU would be the new sole bargaining agent, the new bargaining unit

was defined and a new certification order naming the BLE as bargaining agent was issued on October 31, 1997.

Although VIA then commenced negotiations, the employer eventually had a change of heart. This change of heart was communicated on December 10, 1997 when the solicitor for VIA, Louise Béchamp, forwarded to counsel for the BLE, Jim Shields, a without prejudice letter. This letter was produced before the Board with the consent of both parties. It indicated in part that in the view of VIA:

"As a result of the section 18 application and of the certification order issued to the BLE, no collective agreement presently applies to the newly defined bargaining unit. We will therefore be giving precedence to the implementation of the initiative, over any previously existing rule - including crew consist provisions - of now defunct collective agreements. As you well know, the Brotherhood has been aware of the Corporation's plan to introduce these operational changes for more than eight (8) months now.

The Corporation shall be forthwith advising the Brotherhood that it will proceed to the system wide implementation of the merger of positions and operating duties by the latest April 1, 1998 on terms and conditions it will deem appropriate, but including such terms and conditions as were agreed to between the Corporation and the majority of the Brotherhood's General Chairmen."

Put quite simply, VIA's position was that the new certification order issued for the broader unit on October 31, 1997, following the section 18 application and consequent vote which chose the BLE to be the sole bargaining agent for the newly defined bargaining unit, was felt to have rendered defunct the previously applicable collective agreements. In support of this proposition both Mr. Bannon E. Woods in giving his evidence on behalf of the employer and counsel for VIA cited the effect of the new certification order issued by the Board following the section 18 application and a decision of the Board in Canadian National Railway Company (1994), 96 di 17; and 27 CLRBR (2d) 51 (CLRB no. 1092).

In that matter, the decision of the majority considered the applicability of sections 91(1), 89 and (50) of the Code. The Board also considered the provisions of sections 48 and 49 of the Code. The decision of the majority does not address the provisions of section 36(1)(c) of the Code, although the decision of the minority does refer to that section. In essence, the majority concluded that a consolidated bargaining unit's right to strike under section 89 was not fully matured and capable of being actuated in a situation where some of the members who had been consolidated in the bargaining unit pursuant to the provisions of section 18 had not met the requirements of section 89. If some members of the bargaining unit were not in a position to strike, the unit could not strike.

Because a portion of the newly consolidated unit at the time the strike had been called did not have a crystallized right to strike, the majority in Canadian National Railway Company, *supra*, held that the newly defined bargaining unit itself did not have the right to strike. The Board there did not have to deal with the applicability of the relevant previous collective agreements.

It should also be noted that the situation of the employees in that case was different from that of the present employees in that, with respect to the vast majority of the employees in the newly defined bargaining unit, the provisions of section 89 were applicable.

In the present case, the members of the bargaining unit represented by the applicant bargaining agent did not meet the requirements of section 89. There is not presently an apprehended strike situation. The bargaining agent seeks to continue negotiations. In the present situation, where there is not a strike or lockout situation, the rights of the parties are best viewed through the perspective of section 36(1)(c) of the Code, which reads as follows:

"36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

...

c) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto."

There is no reason why the general wording of section 36, which relates to any certification or any situation where a trade union is certified as the bargaining agent for a bargaining unit by the Board, should not have application to an amendment or alteration under section 18. Indeed, in its context, section 36 is clearly intended to be a provision of comprehensive application.

Section 36(1)(c) was previously given effect in similar circumstances to the present, to allow a collective agreement to continue as valid following a change in bargaining unit composition, although in the previous matter the bargaining agent consolidation occurred under the successor rights provisions of the Code. (See Bell Canada (1981), 43 di 238, [1981] 2 Can LRBR 284; and 81 CLLC 16,099 (CLRB no. 311). In that case, the Board interpreted section 136(1) (now section 36(1)) as giving the substituted bargaining agent the right to continue grievance proceedings on behalf of employees following a change of bargaining agent and subsequent to the agreement's expiration date.)

Such substitution, whether it occurs under the successor rights provisions of sections 43 to 46 of the Code, under section 18, or under any other provision of the Code, occurs because section 36 specifically provides that where when a trade union is certified for a bargaining unit, that trade union is substituted as a party to any collective agreement applicable to the employees in the bargaining unit. Considering section 36 in this way, where there is a change in the bargaining agent, the intent of the Code is not that the agreement be terminated, but that it be continued.

Section 36(2) perhaps injects some confusion into the question of the intended operation of section 36(1)(c). It indicates as follows:

"36.(2) Where, pursuant to paragraph (1)(c) a trade union is substituted as a party to a collective agreement, the trade union may, within three months after the date on which it is certified as the bargaining agent for a bargaining unit affected by the collective agreement, require the employer who is a party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement."

In apparent reliance on this provision, VIA, on December 23, 1997, taking the position that section 48 of the Code was applicable, served a "Notice to Bargain Pursuant to section 48 of the Canada Labour Code" on the BLE. The difficulty with this notice is that it relied upon an interpretation of the provisions of section 48 itself, which did not at the same time consider the words of section 36(1)(c). The wording of section 48 indicates that the section is operative where the Board has certified a bargaining agent for a bargaining unit and "no collective agreement binding on the employees in the bargaining unit is in force." However, in the current circumstances, all of the relevant collective agreements applicable to the employees in the newly consolidated unit were not to expire before December 31, 1997 and in the Board's view were continued by the effect of section 36(1)(c).

An additional important consideration is the general intent of the Code that the agreement of the parties should govern their labour relations. Given the importance of this principle, one must be suspicious of an interpretation of the Code which would see the agreement of the parties rendered defunct by a Board order consolidating bargaining units.

It is, therefore, more consistent with the intent of the Code to view section 36(1)(c) as applicable to continue the existing agreements in force. When this occurs, section 36(2) should not be construed to negate the obvious intent that section 48 is only to

apply in circumstances where there is not a subsisting collective agreement. There is another more rational interpretation of the effect of section 98 in such circumstances.

Section 36(2) can be viewed as a special provision that applies when a bargaining agent is certified for a unit in which there are employees already affected by an existing collective agreement. The section affords the trade union being substituted as a party to an existing collective agreement affecting the employees newly in the unit, an opportunity to require the employer to negotiate and to renew or revise that collective agreement. Section 36(2) should not be viewed as terminating the effect of an existing agreement, but as allowing an opportunity to the parties to negotiate, to revise the existing agreement to reflect the change in circumstances. Such an interpretation is more consistent with the general scheme of the Code. It is also more consistent with the intent and effect of the freeze provisions of section 50, which continue the effect of an agreement during bargaining.

Pursuant to the scheme of the Code, a collective agreement is in force until it expires according to its terms. If during the final three months of the agreement, notice to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement is served pursuant to section 49, then the freeze provisions of section 50(b) apply and the content of the agreement will continue to have effect, without unilateral alteration by the employer or by the bargaining agent, until the requirements of sections 89(1)(a) to (d) are met.

In this context, section 36(2) of the Code simply allows the substituted bargaining agent to require the employer to commence collective bargaining for the purpose of revising the collective bargaining and to serve notice to bargain outside the statutory period provided for by section 49. To conclude that section 36(2) requires the termination of the collective agreement affecting the employees in the newly certified bargaining unit, would be directly contrary to the intent of section 36 and the general provisions of the Code according to which collective agreements only

become defunct or cease to have effect where the Board orders the revocation of the certification or bargaining rights of a trade union (section 42(1)(a)), or where no notice to bargain has been given pursuant to section 49, or where the parties have acquired their right to strike or lock out pursuant to section 89 of the Code.

It is common ground that the provisions of sections 89(1)(a) to (d) have not been met. Notice to commence collective bargaining had been served by VIA to the BLE on October 1, 1997, as per the terms of the applicable collective agreements. Notice to commence collective bargaining had been served to the corporation by the UTU on October 1, 1997, as per the terms of their then applicable agreements. To quote from Exhibit 9, which is a letter from Mr. Bannon E. Woods, the Director of Human Resources and Labour Relations of the respondent employer, dated November 10, 1997:

"Notice to commence bargaining had been served by the Corporation to the Brotherhood of Locomotive Engineers on October 1, 1997 as per the terms of the collective agreements concluded with your union. Notice to commence bargaining had further been served on the Corporation by the United Transportation Union on October 1, 1997 as per the terms of their respective agreements."

As Exhibit 9 shows, VIA, on November 10, 1997, subsequent to the renewed certification, renewed its own collective bargaining process. The concluding words of the letter of November 10, 1997 over the signature of Mr. Bannon E. Woods are:

"In regards to the contract negotiations, the Corporation served demands on October 16, 1997 which are hereby renewed. We propose to address this issue subsequent to the discussions and negotiations on the adverse affects of the material change."

For the employer to subsequently abandon negotiations and endeavour to reverse its recognition of the notice to commence bargaining, which it relied on at that time, and to attempt to suggest retrospectively that the Board's certification order

somehow revoked the existing collective agreement, contrary to the express provisions of section 36(1)(c), is not, in the view of the Board, a sustainable position.

The parties had issued a notice to commence collective bargaining under the provisions of section 49. This was done pending the revision of the certification order by the Board. This notice was recognized by the employer subsequent to the bargaining unit change. It is a more appropriate application of the provisions of the Code to view the applicable agreements as having been continued by section 36(1)(c) and to view the sheltering provisions of section 50 as being applicable to those agreements.

Given this context, the terms and provisions of the applicable collective agreements with the substitution of the BLE as a party, must be viewed as being subject to the freeze imposed by section 50.

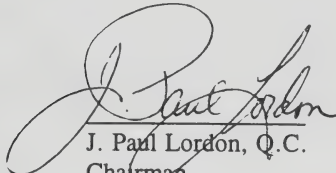
There was a discussion before the Board in the present proceedings about the nature of such a freeze. Counsel for the employer indicated that such a freeze must generally be viewed as a "business as usual" freeze allowing for components of the business relationship between the bargaining agent and the employer, which are ordinarily and routinely subject to change, to be reasonably altered. Negotiations, it is argued, cannot serve as a pretext for the complete immobilization of an enterprise. This view does find considerable support in the authorities. In this respect, it is also noted that the material change provisions of the relevant collective agreements had been invoked well before the notice to commence collective bargaining had been served. It is also noted that negotiations aimed at allowing the material change provisions to be implemented had been commenced and the "crewing initiative", under whatever name, had already been initiated and announced well prior to the notice to commence collective bargaining. Nevertheless, agreement on the matters now in dispute, which are central to the current bargaining process, had not been reached prior to the present proceedings. Given the nature and

importance of the matters in issue, and their clear identification in the bargaining process, they should not be viewed as matters ordinarily or routinely subject to change, and hence they cannot be unilaterally altered during the freeze period.

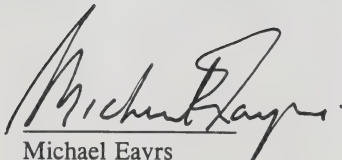
There was considerable evidence suggesting that because of the difficulty in assimilating the new employees into its bargaining structure, the BLE had not moved as rapidly to develop its position vis-à-vis the implementation of the "crewing initiative" as the employer would have wanted. While the difficulties are understandable, in the Board's view, the bargaining agent should not unduly resist the employer's request for reasonable flexibility as negotiations proceed. The negotiations between the BLE and VIA should proceed promptly in order to resolve the outstanding issues in the broader context of a new collective agreement governing the bargaining unit, if possible.

The Board indicated that the collective agreement and the notice to bargain collectively served on October 1, 1997 cannot reasonably be rendered defunct or discontinued by the Board's broadened certification order of October 31, 1997. The essential content of the previous collective agreements remains in operation pursuant to section 50 of the Code. Failing effective negotiations to resolve the outstanding issues, the parties remain bound by the content of the relevant collective agreements as extended by the provisions of section 50 of the Code. A denial of the employees' employment rights contrary to agreement provisions constitutes, in the view of the Board, the closing of a place of employment or a refusal by an employer to continue to employ the employees. Where collective bargaining has commenced and where the impact of the actions on the current negotiations was not seriously disputed by the employer, such denial of employment is clearly a lockout within the Code. That this was so was acknowledged in the course of his testimony by Mr. Bannon E. Woods, who agreed that if the employer was wrong in suggesting that the collective agreement could no longer be viewed as having any force, the employer's entire position was unsustainable.

In the result therefore, the Board declared that there was an unlawful lockout contrary to the provisions of section 92 and in violation of the provisions of the freeze instituted by section 50(b) of the Code.



J. Paul Lodon, Q.C.
Chairman



Michael Eayrs
Member



Roza Aronovitch
Member

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Summary

Captain Brian L. Eamor, *applicant*, Air Line Pilots Association (ALPA), *respondent*, and Air Canada, *employer*.

Board File: 14898 (745-04404)
CLRB/CCRT Decision no. 1234
August 24, 1998

On May 7, 1996, the Board determined that the Canadian Airline Pilots Association (CALPA) - subsequently renamed the Airline Pilots Association (ALPA) - had breached section 37 of the Code with respect to the manner in which it represented the Applicant, Brian L. Eamor, in regard to his dismissal from Air Canada. The Board ordered the payment, by CALPA, of all his reasonable legal fees and expenses related to the hearing before the Board. Furthermore, Eamor was entitled to the payment of all reasonable legal fees and expenses related to the prosecution of his grievance and the arbitration hearing, which included his expenses and costs of attending all the grievance hearings.

Counsel for Eamor contacted counsel for the Union and requested payment of those fees and expenses which he asserted flowed from the Board's original decision. The Union would not accede to the payment unless Eamor was put to the "strict proof" of every aspect of his claim for compensation. In light of this the Board was left with no alternative but to convene a hearing in order to quantify the reasonable fees and expenses which flowed from its earlier order.

Résumé

Capitaine Brian L. Eamor, *requérant*, Association des pilotes des lignes aériennes (ALPA), *intimée*, et Air Canada, *employeur*.

Dossier du Conseil: 14898 (745-04404)
CLRB/CCRT Décision n° 1234
le 24 août 1998

Le 7 mai 1996, le Conseil a conclu que l'Association canadienne des pilotes de lignes aériennes (CALPA) - subséquemment renommée l'Association des pilotes des lignes aériennes (ALPA) - avait violé l'article 37 du Code en ce qui concerne la façon dont elle avait représenté le requérant, Brian L. Eamor, par rapport à son congédiement d'Air Canada. Le Conseil a ordonné que CALPA paie tous les frais juridiques et dépenses raisonnables liés à l'audience devant le Conseil. De plus, M. Eamor avait droit au paiement intégral des frais juridiques et dépenses raisonnables liés à l'instruction de son grief et à l'audience d'arbitrage, y compris les dépenses et les frais engagés pour assister à toutes les audiences relatives au grief.

L'avocat de M. Eamor a communiqué avec l'avocat du syndicat et a demandé le paiement des frais et dépenses qui, a-t-il affirmé, découlaient de la décision initiale du Conseil. Le syndicat a répondu qu'il accepterait de payer uniquement si M. Eamor produisait une «preuve stricte» de tous les aspects de sa demande d'indemnisation. À la lumière de ces faits, le Conseil n'a eu d'autre choix que de tenir une audience pour déterminer le montant des frais et dépenses raisonnables qui découlaient de son ordonnance antérieure.



The purposes of a Board order, in cases such as this, is to restore the complainant to the position he would have been, had no violation of the Code occurred. In keeping with the purposes outlined in Royal Oak Mines, [1996] 1 S.C.R. 369, the critical consideration is whether or not the remedy requested of the Board, as it relates to each of the claims made, is "rationally connected or related to the breach and its consequences". If so, the Board must attempt, as reasonably and fairly as possible, to make the complainant whole.

The Union argued that the Board could not make an order for the fees and expenses incurred for applications for reconsideration before the Board or an appeal before the Federal Court of Appeal. It argued that since those bodies had not made an order for costs the Board was now functus. The Board pointed out that to characterize its original order as relating only to "costs" as that term is traditionally understood in civil proceedings - i.e. costs awarded to the successful party - is a misnomer. Eamor's entitlement, in keeping both with the principles set forth the jurisprudence referred to, and with the terms of the Board's original order, is to be fairly compensated for the fees and expenses incurred in rectifying the Union's breach of section 37. Although the term "costs" is often used in this and similar decisions of the Board, the term is, in the context of an order pursuant to section 37, far broader and encompassing than the restricted interpretation generally given to an award of costs to the successful party in a civil proceeding.

L'objet d'une ordonnance du Conseil, dans les affaires de ce genre, est de rétablir le plaignant dans la situation dans laquelle il se serait trouvé s'il n'y avait eu aucune violation du Code. Conformément aux buts énoncés dans Royal Oak Mines, [1996] 1 R.C.S. 369, le point critique à considérer est de savoir s'il existe un lien rationnel entre la violation, ses conséquences et le redressement demandé au Conseil relativement à chacun des aspects de la demande. Si tel est le cas, le Conseil doit tenter, le plus raisonnablement et équitablement possible, d'indemniser le plaignant.

Le syndicat a prétendu que le Conseil ne pouvait rendre une ordonnance relativement aux frais et dépenses engagés pour les demandes de réexamen présentées au Conseil ou pour un appel devant la Cour d'appel fédérale. Il a soutenu que, puisque ces organismes n'avaient pas rendu d'ordonnance quant aux dépens, le Conseil était maintenant dessaisi de l'affaire. Le Conseil a fait remarquer qu'on fait une erreur lorsqu'on caractérise son ordonnance initiale comme ayant trait uniquement aux «dépens» au sens où ce terme est habituellement employé en matière civile - c'est-à-dire les dépens attribués à la partie qui a gain de cause. Conformément aux principes énoncés dans la jurisprudence mentionnée, et aux termes de l'ordonnance initiale du Conseil, M. Eamor a le droit d'être indemnisé équitablement pour les frais et dépenses engagés en vue de corriger la violation de l'article 37 par le syndicat. Bien que le terme «dépens» soit souvent utilisé dans la présente décision et dans des décisions semblables du Conseil, dans le contexte d'une ordonnance rendue en vertu de l'article 37, il a une acception beaucoup plus large et englobante que l'interprétation restreinte qu'on lui accorde en général dans le contexte de l'attribution de dépens à la partie qui a gain de

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

A Board order to compensate a complainant for costs pursuant to section 37 would be a hollow directive if it did not include those costs incurred in successfully defending subsequent union appeals of the Board's original determination. To determine otherwise would essentially emasculate the effect of a Board order to compensate a successful section 37 complainant.

The Board concluded that its jurisdiction to order payment of the fees and expenses was derived both from the fact that it retained jurisdiction to do so in its original order as well as the fact that the payment of the same were rationally connected to the Union's original breach of the Code.

The Union argued further that the fees and expenses incurred by the complainant to present his case at the quantum hearing itself were not costs which were connected to its original breach of the Code. The Board concluded that an award of compensation for fees and expenses incurred at the quantum hearing flows directly from the Board's original order and the jurisdiction it retained in that regard. In addition, having regard to the facts of this case, and the comments of the Supreme Court in Royal Oak, *supra*, an award of costs for the quantum hearing was both rationally connected and related to the Board's original determination of the section 37 breach and the implementation of its order. This "rational connection" is based not on the fact that the Board retained jurisdiction with respect to the costs issue but rather on the broader remedial purposes of a Board order applied in a fashion consistent with the Code's policy objectives and the requirement that its remedy counteract any consequences of a contravention of the same. From that perspective an award of costs for the quantum hearing in this case is both consistent with the

cause en matière civile.

L'ordonnance du Conseil visant à indemniser un plaignant de ses frais aux termes de l'article 37 constituerait une directive vide de sens si elle n'englobait pas les frais engagés pour se défendre contre les appels subséquents interjetés par le syndicat de la décision initiale du Conseil. Toute décision contraire aurait essentiellement pour effet de rendre nulle l'ordonnance de redressement rendue par le Conseil aux termes de l'article 37.

Le Conseil a conclu que son pouvoir d'ordonner le paiement des frais et dépenses était dérivé à la fois du fait qu'il était demeuré saisi de l'affaire dans son ordonnance initiale et du fait qu'il existait un lien rationnel entre le paiement de ces frais et l'infraction initiale au Code commise par le syndicat.

Le syndicat a par ailleurs soutenu que les frais et dépenses engagés par le plaignant pour présenter sa preuve à l'audience tenue pour fixer le montant des dommages n'étaient pas reliés à sa violation initiale du Code. Le Conseil a conclu que l'ordonnance visant à indemniser le plaignant de ses frais et dépenses engagés à l'audience tenue pour fixer le montant de ces frais découlait directement de l'ordonnance initiale et du fait qu'il était demeuré saisi de l'affaire. En outre, pour ce qui est des faits de l'espèce, et compte tenu des observations de la Cour suprême dans Royal Oak, précitée, l'attribution de dépens pour l'audience tenue pour fixer le montant des dommages était liée à la fois à la décision initiale du Conseil relativement à l'infraction de l'article 37 et à l'application de son ordonnance. Ce «lien rationnel» est fondé non pas sur le fait que le Conseil est demeuré saisi de l'affaire en ce qui concerne les dépens, mais plutôt sur les fins de redressement plus larges d'une ordonnance du Conseil, qui doit

policy objectives of the statute and serves to counteract the consequences of the Union's breach of the Code.

In interpreting the provisions of the Code, the Board is cognizant of the objectives contained in the preamble. Among those is "the constructive settlement of disputes." Insofar as the Code deals with the relationship between a union and its members, the constructive settlement of their differences is of primary significance. In the Board's experience, an overwhelming majority of cases, such as the present, are resolved constructively, without the Board's intervention, through direct negotiation of the parties. This practice must be encouraged and fostered by the Board at every possible turn. Exercise of the Board's discretion, where appropriate, in awarding compensation for costs incurred for a quantum hearing may well have the effect of encouraging parties to constructively settle disputes directly without resorting to the Board's processes or further litigation.

The Board noted that an award of costs pursuant to section 37 is not, and should not be, punitive. Nor is it axiomatic that a Union is responsible for costs incurred at a quantum hearing should one be convened. The Board's discretion with respect to costs for the quantum hearing should be exercised only in those circumstances where to do so would promote the objectives of the Code, and encourage the constructive settlement of similar disputes between the union and its members.

être appliquée d'une façon conforme aux objectifs visés par le Code, et sur l'obligation que le redressement contrebalance les conséquences éventuelles d'une infraction à l'ordonnance. De ce point de vue, l'attribution de dépens pour l'audience devant fixer le montant des frais, en l'occurrence, doit être à la fois conforme aux objectifs de la loi et à la nécessité de contrebalancer les conséquences de la violation du Code par le syndicat.

En interprétant les dispositions du Code, le Conseil est conscient des objectifs énoncés dans le préambule, notamment en ce qui concerne «le règlement positif des différends». Dans la mesure où le Code traite du rapport entre un syndicat et ses membres, le règlement positif des différends revêt, à notre avis, une importance primordiale. D'après l'expérience du Conseil, la vaste majorité des affaires sont réglées de façon positive, au moyen de négociations directes entre les parties. Le Conseil doit encourager et favoriser cette pratique chaque fois que c'est possible. Lorsque le Conseil décide d'exercer son pouvoir discrétionnaire, dans des circonstances appropriées, en vue d'indemniser un requérant des frais engagés en vue d'une audience tenue pour fixer le montant de dommages, cela pourrait très bien avoir pour effet d'encourager les parties à régler leurs différends de façon positive, et ce, directement sans recours aux processus du Conseil ni à d'autres procédures.

Le Conseil a signalé que l'attribution de dépens aux termes de l'article 37 ne revêt pas, et ne devrait pas revêtir, un caractère punitif. De plus, il ne s'ensuit pas qu'un syndicat est responsable des frais engagés pour une audience visant à déterminer le montant de dommages, en supposant qu'une telle audience soit tenue. Le Conseil n'exercera son pouvoir discrétionnaire à l'égard des frais engagés pour une telle audience que si les circonstances

favorisent la réalisation des objectifs du Code et encouragent le syndicat à régler de façon positive ses différends avec ses membres.

Canada. At the conclusion of its reasons for decision the Board made the following determination:

"Eamor is entitled to the full payment, by CALPA, of all his reasonable legal fees and expenses related to the hearing before this Board. Furthermore, Eamor is entitled to the full payment of all reasonable legal fees and expenses related to the prosecution of his grievance and the arbitration hearing; this shall include his expenses and costs of attending all the grievance hearings. We hereby order the payment of the above by CALPA.

...

With that goal in mind the Board, pursuant to section 20 of the Code, will retain jurisdiction with respect to the implementation of its order as above, and to the ordering of a further remedy herein.

(Brian L. Eamor (1996), 101 di 76; 39 CLRB (2d) 14; and 96 CLLC 220-039 (CLRB no. 1162), pages 109; 51; and 143,384)

The Board's decision, was - on application by the Union - subsequently reviewed and confirmed both by a reconsideration panel of the Board and by the Federal Court of Appeal.

Following those reviews, counsel for Eamor contacted counsel for the Union and requested payment of those costs that he asserted flowed from the Board's original decision.

The Union, in response to the various requests of Eamor's counsel, would not accede to the payment of any amount and took the position that it contested:

"... all of Mr. Eamor's calculations of his costs of proceeding with the grievance, arbitration and section 37 complaint and put the Complainant to the strict proof of actual and reasonable expenses incurred and paid."

(letter dated November 20, 1996 from Keenan Lehrer to CLRB; emphasis added)

II

The following summarizes those claims that had either been agreed to or withdrawn as well as those that remained in issue at the conclusion of the hearing and argument before the Board:

	Category	Amount Initially Claimed	Status	Present Amount Claimed
1	Shortt, Moore & Arsenault Arbitration Proceedings	\$86,182.27 + tax <u>\$11,005.86</u> \$97,188.03	conceded as reasonable but only \$42,412.27 incurred and payable	\$97,188.03
2	Shortt, Moore & Arsenault Section 37 Proceedings	\$1,212.70 + tax <u>\$168.85</u> \$1,381.55	Conceded as reasonable but not payable	\$1,381.55
3	Shortt, Moore & Arsenault Section 18 Reconsideration Proceedings	\$16,379.90 + tax <u>\$2,247.88</u> \$18,627.78	conceded as reasonable but not payable	\$18,627.78
4	Shortt, Moore & Arsenault Federal Court Judicial Review	\$65,450.01 + tax <u>\$8,868.03</u> \$74,118.04	conceded as reasonable but not payable	\$74,118.04
5	Shortt, Moore & Arsenault Quantum Hearing Costs	\$75,491.48 + tax <u>\$8,447.16</u> \$83,938.69	Entirely contested	\$83,938.69
6	Brian Eamor 1992 - 1995	\$40,833.44	\$7,481.96 conceded: \$33,351.48 contested	\$40,833.44
7	Brian Eamor 1996	\$7,034.20	contested	\$7,034.20

8	Brian Eamor 1997	\$5,142.98	contested	\$5,142.98
9	Ken Green	\$14,166.10	withdrawn	\$0.00
10	Jones McCloy Petersen Alan Finlayson	\$51,653.11	\$9,820.00 conceded; balance withdrawn	\$9,820.00
11	Ross Senior	\$38,000.00	Conceded as reasonable but not payable	\$38,000.00
12	Ranking & Company Harry Ranking	\$5,000.00	revised account contested	\$2,850.00

As is readily apparent, the above amounts ultimately appear to be extraordinary. However, the entire circumstances leading to Eamor's dismissal, CALPA's conduct, the Board's ultimate order directing compensation to Eamor (see Eamor, supra) and the present hearing required to determine the compensation, have been extraordinary. In most circumstances, as we discuss later, the Board does not get involved in the determination of the compensation payable in cases such as the present; nor, in ordinary circumstances, do the amounts involved even approximate those claimed here. However, the Board's continued involvement in this matter was unavoidable, and - as will become apparent - the amounts ultimately awarded in compensation are warranted.

III

The Board's jurisdiction to make the compensation order it did in Eamor, supra, is derived from section 99 of the Code. The extent of the Board's authority in this regard was recently reviewed by the Supreme Court of Canada in Royal Oak Mines Inc. v. Canada (Labour Relations Board), [1996] 1 S.C.R. 369, where the Court made the following comments:

In examining the legislation itself it is apparent that Parliament has clearly given the Canada Labour Relations Board a wide remedial role. The wording of s. 99(2) does not place precise limits on the Board's jurisdiction. In fact, the Board may order anything that is 'equitable' for a party to do or refrain from doing in order to fulfil the objectives of the Code. In my view, this was done to give the Board the flexibility necessary to address the ever changing circumstances that present themselves in the wide variety of disputes which come before it in the sensitive field of labour relations. The

aims of the Canada Labour Code include the constructive resolution of labour disputes for the benefit of the parties and the public. The expert and experienced labour boards were set up to achieve these goals. The problem before the Board was one which Parliament intended it to resolve.

The requirement that the Board's order must remedy or counteract any consequence of a contravention or failure to comply with the Code imposes the condition that the Board's remedy must be rationally connected or related to the breach and its consequences. This requirement is also consistent with the test established in National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 267, which required that there be a relation between the breach, its consequences and the remedy. Section 99 also provides that the Board may remedy breaches which are adverse to the fulfilment of the objectives of the Code. This empowers the Board to fashion remedies which are consistent with the Code's policy considerations. Therefore, if the Board imposes a remedy which is not rationally connected to the breach and its consequences or is inconsistent with the policy objectives of the statute then it will be exceeding its jurisdiction. Its decision will in those circumstances be patently unreasonable.

...

In my view remedies are a matter which fall directly within the specialized competence of labour boards. It is this aspect perhaps more than any other function which requires the board to call upon its expert knowledge and wide experience to fashion an appropriate remedy. No other body will have the requisite skill and experience in labour relations to construct a fair and workable solution which will enable the parties to arrive at a final resolution of their dispute. Imposing remedies comprises a significant portion of the Board's duties. Section 99(2) of the Canada Labour Code recognizes the importance of this role and accordingly, gives the Board wide latitude and discretion to fashion 'equitable' remedies which it feels will best address the problem and resolve the dispute. By providing that the Board may fashion equitable remedies Parliament has given a clear indication that the Board has been entrusted with wide remedial powers. Furthermore, a broad privative clause in s. 22(1) provides that, not only are the Board's decisions final, but so too are its orders. This provision lends support to the position that the court should defer to the remedial orders of the Board which are made within its jurisdiction. That is to say there should be no judicial interference with remedial orders of the Board unless they are patently unreasonable."

(pages 402-405)

The purposes of the Board's remedy in the present case is to restore the complainant to the position he would have been, had no violation of the Code occurred; put another way, the compensation ordered should counteract, as much as possible, the consequences of the union's breach of the Code.

The Supreme Court of Canada in Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 5005, [1990] 1 S.C.R. 1298, commented on the Board's remedial powers designed to "make whole" a successful complainant.

"The remedial provisions improve significantly the position at common law of an aggrieved person. At common law, courts were restricted to an award of damages, whereas under the Canada Labour Code a broad range of remedies designed to 'make whole' are available. The range of remedies recognizes that often an award of damages will only go a short distance in remedying the effects of a breach. Parliament has submitted a broad, comprehensive, remedial scheme much superior to an award of damages available at common law. ..."

(page 1318)

This "make whole" aspect was confirmed by the Court in Royal Oak, supra. There, the Board concluded that the employer had breached its duty to bargain in good faith and ordered it to propose an agreement to the union based both on a tentative agreement previously presented by the employer and on the final report of the Commission. In the Supreme Court's view:

"... This achieved the result that the parties were put back in the position they would have been in were it not for the appellant's violation; namely, with a collective agreement tabled for the Union's consideration. Therefore, there is a clear relation between the appellant's breach of its duty to bargain in good faith, the consequences of that breach and the remedy imposed by the Board."

(page 411)

In Gerald M. Massicotte (1980), 40 di 11; [1980] 1 Can LRBR 427; and 80 CLLC 16,014 (CLRB no. 234), (upheld in Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 F.C. 216 (C.A.), and in Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 S.C.R. 710, the Board concluded that the union had breached its duty of fair representation when it had refused to represent the complainant on the grounds that he was a part-time employee. In discussing the appropriate remedy, the Board stated that "...its intention is to place Massicotte in the position he should have been in had he been represented." As part of the appropriate remedy, the Board ordered that the grievance be referred to arbitration and found that the complainant was entitled to be represented by counsel of his choice. In addition, the Board ordered the following:

"4. Massicotte, of course, may be represented in all future proceedings arising out of this decision and at arbitration by counsel of his choice. The legal fees, disbursements and expenses shall be paid by the union. As well his reasonable disbursements and expenses shall be paid by the union. If there is any dispute, it shall be referred to this Board for final determination."

(pages 27; 440; and 516; emphasis added)

The Board applied a similar approach in Luc Gagnon, (1992), 88 di 52 (CLRB no. 939), page 76 (upheld by the Federal Court of Appeal, in Cartage and Miscellaneous Employees Union, Local 931 v. Canada Labour Relations Board et al., judgment rendered from the bench, no. A-824-92, June 14, 1994).

In keeping with the purposes outlined in Royal Oak, supra, the critical consideration, is whether or not the remedy requested of the Board, as it relates to each of the claims made, is "rationally connected or related to the breach and its consequences." If so, the Board must attempt, as reasonably and fairly as possible, to make the complainant whole.

IV

At the hearing, ALPA raised what were referred to as "jurisdictional issues." These issues included, inter alia, the argument that:

"the Board is functus officio on the issue of an order of interests and an order of costs of the section 18 reconsideration application [i.e. ALPA's Reconsideration Application of this Board's original decision], the s. 28 Federal Court of Appeal application [i.e. ALPA's application for judicial review of the Board's original decision] or the quantum hearings [i.e. the present hearings]."

(ALPA's final argument, page 9)

For the most part, although somewhat rephrased and renamed, the "jurisdictional" issues raised are similar to those raised in a letter by counsel for ALPA to the Board dated December 8, 1997. The Board responded to those issues in Captain Brian L. Eamor, January 22, 1998 (LD 1779). Accordingly, we will not, in this decision, retill the same soil. Those items that were not addressed in the above letter decision will be dealt with later herein. In any event, each of

the jurisdictional issues raised are, for reasons contained in our letter decision, or subsequently herein, dismissed.

COSTS DIRECTLY LINKED TO THE "BREACH"

Initially, ALPA argued that the Board's jurisdiction is limited to ordering only such compensation for losses that Eamor can establish "as having a direct causal relationship to the breach" of section 37 by the union (see page 26 of ALPA's Brief of Argument). The "breach" to which ALPA argues the costs must directly relate, is the original failure of the Union's representatives to inform Eamor that they had "turned him in" to Air Canada back in December 1991. With respect, we cannot agree. Such an interpretation of the Board's remedial powers under section 99 is unacceptably narrow and does not conform to the Board's original order in Eamor, supra, or the remedial and equitable purposes of a Board order as set out in Royal Oak, supra.

COSTS OF RECONSIDERATION AND FEDERAL COURT OF APPEAL APPLICATIONS

ALPA asserts that in both the reconsideration application before this Board and the appeal before the Federal Court of Appeal, each of those bodies had the discretion to order costs. It argues that if those bodies had intended to order costs to Eamor they would have done so. Since that did not occur, ALPA contends that this Board is now without jurisdiction to order payment of any legal fees and expenses incurred by Eamor for the reconsideration or Court of Appeal applications. We do not agree.

To characterize the Board's original order as relating only to "costs" as that term is traditionally understood in civil proceedings - i.e. costs awarded to the successful party - is a misnomer. As our original order reflects, Eamor was:

"... entitled to the full payment, by CALPA, of all his reasonable legal fees and expenses related to the hearing before this Board. Furthermore, Eamor is entitled to the full payment of all reasonable legal fees and expenses related to the prosecution of his grievance and the arbitration hearing; this shall include his expenses and costs of attending all the grievance hearings."

(emphasis added)

Eamor's entitlement, in keeping both with the principles set forth in section III above, and with the terms of the Board's original order, is to be fairly compensated for the fees and expenses incurred in rectifying the Union's breach of section 37. Although the term "costs" is often used in this and similar decisions of the Board, the term is, in the context of an order pursuant to section 37, far broader and encompassing than the restricted interpretation generally given to an award of costs to the successful party in a civil proceeding.

In any event, there can be little doubt that the fees and expenses incurred by Eamor in opposing both ALPA's section 18 reconsideration application and its section 28 application to the Federal Court of Appeal are fees and expenses which are rationally connected or related to the breach determined by this Board in Eamor, supra, and its consequences. A similar conclusion was reached in Massicotte, supra.

An order under section 37, made with the intention to compensate the complainant for the fees and expenses incurred as a result of the union's breach, would be meaningless if, subsequent to the Board's original section 37 order, the complainant was left to personally bear all the fees and expenses incurred in defending his original victory against subsequent, unsuccessful, proceedings launched by the union. Were that the case a successful complainant could well be deprived, by simple attrition, of the compensatory benefits bestowed upon him/her by Board order.

COSTS OF THE QUANTUM HEARING

We hold a similar view with respect to the costs incurred in the present "quantum hearing" (as it came to be called).

Matters relating to the payment of fees and expenses ordered pursuant to section 37 have almost invariably been resolved through the goodwill of the union and its member in subsequent negotiations. In rare cases, the Board has been called upon to reach a decision on the amount of compensation to be paid based on written representations filed by the parties. However, in the present case, ALPA disputed every aspect of Eamor's claim and put the applicant to the strict evidential proof thereof. Insofar as there is no external process provided for in the Code - such as an application for costs in civil cases - to resolve the quantum issues, and given ALPA's intransigence with respect to the admission of any costs payable without the applicant being put

to the "strict proof" thereof, the Board was left with no choice but to convene a hearing in order to quantify the reasonable fees and expenses which flowed from its earlier order.

ALPA now asserts that those same quantum hearings, which its conduct essentially helped inspire, are not a:

"consequence/damage caused by the actions which the Board found to be an unfair labour practise vis a vis Mr. Eamor and a costs order in regard to those proceedings is neither necessary for nor conducive to the fulfilment of the objectives of Part I of the Code."

(ALPA's Brief of Argument, page 25)

We do not agree.

Where a hearing is required to resolve the issue of costs ordered by the Board, the question of whether or not the union must compensate its member for the costs of that hearing is very much an issue related to the fulfilment of the objectives of the Code.

In interpreting the provisions of the Code, the Board is cognizant of the objectives contained in the preamble. Among those is "the constructive settlement of disputes." Insofar as the Code deals with the relationship between a union and its members, the constructive settlement of their differences is, in our view, of primary significance. In the Board's experience, an overwhelming majority of cases, such as the present, are resolved constructively, without the Board's intervention, through direct negotiation of the parties. This practice must be encouraged and fostered by the Board at every possible turn. Exercise of the Board's discretion, where appropriate, in awarding compensation for costs incurred for a quantum hearing may well have the effect of encouraging parties to constructively settle disputes directly without resorting to the Board's processes or further litigation.

In the present case, a hearing was necessitated largely by the position taken by the Union that Eamor be put to the "strict proof" of every aspect of his claim for compensation. Judging from the pre-hearing correspondence between the parties - copied to the Board - ALPA refused either to pay any amount or to agree that any amount was payable unless Eamor strictly proved the same. In light of the Union's position, a hearing was the only avenue available in which the Union's demand, that Eamor's claims be strictly proved, could be met. It may well be that the

Union's position was affected by the claims initially made by Eamor, some of which were withdrawn at the hearing. Regardless of the Union's rationale, its abject refusal to discuss or negotiate the claims cannot be regarded as an attempt, in keeping with the objectives of the Code, to constructively settle the dispute.

The quantum hearing itself was convened pursuant to the Board's original order in Eamor, *supra*, wherein it retained jurisdiction with respect to the implementation of its order. On that basis alone the quantum hearing, and the fees and expenses associated therewith, flow directly from the Board's original order and are subject to a Board order that essentially fulfills its earlier directive. In addition, having regard to the facts of this case, and the comments of the Supreme Court in Royal Oak, *supra*, an award of costs for the quantum hearing is both rationally connected and related to the Board's original determination of the section 37 breach and the implementation of its order. This "rationale connection" is based not on the fact that the Board retained jurisdiction with respect to the costs issue but rather on the broader remedial purposes of a Board order applied in a fashion consistent with the Code's policy objectives and the requirement that its remedy counteract any consequences of a contravention of the same. From that perspective an award of costs for the quantum hearing in this case is both consistent with the policy objectives of the statute and serves to counteract the consequences of the Union's breach of the Code.

To determine otherwise would essentially emasculate the effect of a Board order requiring an unsuccessful union to compensate a successful section 37 complainant. A refusal to pay, negotiate, or agree to any of the claims made for compensation, except as specifically proven and subsequently ordered by the Board, could have prohibitive consequences for a successful complainant. A successful complainant could be denied payment of the compensation ordered by the Board simply due to the inability to absorb the further costs involved in reconvening a Board hearing and marshalling the evidence necessary to fulfill the "strict proof" demands made by the union.

An award of costs pursuant to section 37 is not, and should not be, punitive. Nor is it axiomatic that a Union is responsible for costs incurred for a quantum hearing should one be convened. Although a quantum hearing is rationally related to the original Board order that the union pay certain fees and expenses, the Board has discretion whether, in each circumstance, such costs should be awarded for the quantum hearing. The discretion should be exercised only in those circumstances where to do so would promote the objectives of the Code, and encourage

the constructive settlement of similar disputes between the union and its members. Where the conduct of the complainant is such that it causes or contributes to a hearing being necessitated to resolve the compensation issue, the Board may use its discretion not to order - or otherwise adjust - compensation for the fees and expenses incurred for such a hearing.

The hearing in this matter extended over a period of six days. No concessions for payment of any amounts were made by ALPA until the hearing itself was underway. In our view, the matter was unnecessarily protracted due primarily to ALPA's intransigence and incidentally to the initial amounts claimed by Eamor both in favour of himself and other individuals (subsequently withdrawn). However, in light of ALPA's intransigent position, and of the fact that there are no processes under the Code that would allow for the determination of those costs ordered by the Board other than reconvening the hearing, Eamor was left with little choice but to request that a hearing be held to determine the amounts claimed. And, once there, Eamor's counsel was left with little choice but to prepare for and call evidence on every aspect of Eamor's claim. The Board was equally left with no choice but to convene a hearing to hear evidence on each of the accounts and amounts claimed in order to make a determination pursuant to section 99. In our view, a co-operative and open attitude to discuss or negotiate on the part of ALPA would have had a dramatically beneficial effect on the conduct, costs and the length of the hearing before the Board.

In the circumstances we conclude that an order that the Union compensate Eamor for the fees and expenses incurred by him for the quantum hearing is warranted.

V

As we repeatedly indicated throughout the course of the hearings, the Board is loathe to become involved in the determination of compensation issues such as here. Our objective is to ensure, as far as possible, that the parties resolve the issue of costs between them. However, given the circumstances, we were required to fulfil our mandate in attempting, pursuant to our earlier order, to indemnify the complainant for the reasonable legal fees and expenses rationally flow from ALPA'S breach of section 37 of the Code.

Although reference to decisions on costs from civil courts or registrars will assist in that task, the Board's function, and indeed its primary objective, is to fulfill its labour relations mandate in applying section 99 to the circumstances before it. Although we prefer that the parties resolve

the issue of compensation directly, they should be aware of the general considerations that the Board will bear in mind in determining the appropriate compensation.

In Balvir Gill, November 14, 1997 (LD 1760), the Board addressed the issue of the considerations that it will apply in reaching a conclusion to determine whether the costs or other compensation claimed are reasonable:

"It is with the greatest reluctance that the Board becomes involved in disputes between counsel with respect to payment of reasonable fees and costs pursuant to an order under section 99 of the Code. One would hope that these matters would normally be resolved by the parties themselves, without the Board's intervention. Fortunately, instances where counsel revert the issue of fees to the Board are extremely rare.

The purpose of section 37, and any relief granted pursuant to a violation thereof, is not to punish a respondent union, but rather to rectify the breach of the Code and, as far as possible, make the complainant 'whole'. The Board's policy and practice of granting legal costs and disbursements to a complainant is a remedy ancillary to the main relief. In the present case, the Board's decision awards 'reasonable' legal costs as distinguished from all legal costs. The awarding of legal costs to an applicant who is successful in a section 37 complaint is not to be considered as a windfall for the complainant or his/her counsel. The fundamental purpose for the granting of an order of costs is that they are given by the Board as indemnity to the person who is entitled to receive them and are not imposed as a punishment on the union who must pay them.

From a labour relations perspective, our concern is not to inquire into - or reach any conclusion with respect to - the reasonableness of the account rendered by Ms. Gill's solicitor within the context of her particular solicitor-client relationship. Rather, our concern is focussed on the amount that the union should reasonably be required to compensate Ms. Gill for the losses she incurred in legal fees and expenses as a result of its breach of section 37 of the Code (see: Suzanne Hébert-Vaillant, [1982] OLRB Rep. March 342).

Without being exhaustive, the factors that should be considered in determining a reasonable fee for solicitor services are basically the same as those in civil proceedings. Namely, as indicated by the author Mark M. Orkin in his textbook entitled The Law of Costs, the following criteria may be considered in making this assessment:

- 1. The time expended by the solicitor.*
- 2. The legal complexity of the matters dealt with.*
- 3. The degree of responsibility assumed by the solicitor.*
- 4. The monetary value of the matters in issue.*
- 5. The importance of the matters to the client.*
- 6. The degree of skill and competence demonstrated by the solicitor.*
- 7. The results achieved.*

8. *The ability of the client to pay.*
9. *The reasonable expectation of the client as to the amount of the fee. '*

(Canada Law Book Inc., 2nd Edition, 1996, at page 3-34; and see also to the same effect J.P. Plante, LD 1278, March 14, 1994)

None of the above factors is in itself determinant and all were weighed by the Board in light of the circumstances of the case. ..."

(pages 2-3)

In the present case, with the exception of the accounts relating to Eamor, Rankin (and to a lesser extent Senior), the Board was not asked to determine either the amount of the accounts claimed or their reasonableness. Concessions from counsel during the hearing obviated that necessity.

Accordingly, our determination with respect to the status of each of the accounts claimed is as set forth in our summary contained under section II above. With respect to those accounts that remain in dispute, we have approached the problem below by establishing the amount of those claims that remained in dispute and determining whether each of them, or any portion thereof, are payable pursuant to the criteria set forth above.

1. ACCOUNTS OF SHORTT MOORE AND ARSENAULT

During the hearing, counsel for ALPA initially agreed that items (1) and (2) in section II above were reasonable and payable. With respect to items (3) and (4), although conceding that they represented reasonable fees, counsel argued that they were nevertheless not payable for the reasons that will be dealt with below. However, prior to the conclusion of the hearing, counsel withdrew her agreement that items (1) and (2) were payable as claimed, and argued that although conceding that all four accounts claimed by Shortt were reasonable, none (except for the sum of \$42,412.27) were in fact payable.

ALPA's withdrawal of its concession regarding Shortt's accounts was based on its understanding that the outstanding amounts owed to Shortt had been "credited" to Eamor's account through the internal billing system in Shortt's office. According to counsel for ALPA, because of this there is therefore no amount outstanding and payable to Shortt. Shortt testified that the "crediting" process was applied to Eamor's outstanding account pursuant to instructions

from his firm's accountant. The process was employed to defer payment of the GST, PST and income taxes until such time as the account was actually paid. Shortt confirmed that all the amounts billed to Eamor nevertheless, remain outstanding and owing and that none of them have been reduced, compromised or forgiven in any way.

In the circumstances, we find that the accounts set forth in items (1) to (4) in fact remain owing by Eamor. Having regard to the fact that ALPA concedes that said accounts are reasonable, we hereby order that the accounts in the gross amount of \$190,771.02 be paid to Eamor for payment of the said fees to Shortt, with interest as set forth below.

2. BRIAN L. EAMOR

Eamor testified and entered a number of accounts and claims as exhibits at the hearing.

Without delving into details, suffice it to say that in our view not all of Eamor's claims were proven to our satisfaction. At best, the Board, keeping in mind the principles alluded to earlier, can only reach a "sensible approximation" of a fair amount to be provided to Eamor to compensate him for the fees and expenses he incurred as a result of the Union's breach of section 37. At the hearing, counsel for ALPA conceded that the amount of \$7,481.96 be paid to Eamor. This leaves a balance of \$45,528.66 claimed by Eamor. In light of the deficiencies in establishing the specifics of his claim, we are left to reasonably approximate an amount payable to Eamor. Of the remaining \$45,528.66 in dispute we believe that an amount of \$15,000 is fair and reasonable in the circumstances to compensate Eamor for the personal costs he incurred as a result of the Union's breach of section 37. Accordingly, we order that the gross sum of \$22,481.96 be paid to Eamor in such compensation.

In addition, interest will be payable on the said amount from May 7, 1996, the date of the Board's original order herein.

3. ACCOUNT OF JONES, MCCLOY, PETERSEN

At the hearing, counsel for ALPA conceded that the amount of \$9,820 was payable to Jones, McCloy, Petersen. The original claim by the law firm was accordingly reduced from the \$51,653.11 originally claimed, and counsel for Eamor agreed to accept the sum of \$9,820 in

payment of the said account. Accordingly, we order the payment of the said amount, with interest as set forth below.

4. ROSS SENIOR

At the hearing, counsel for ALPA conceded that the account of Mr. Senior was both reasonable and payable. This concession obviated the need for Senior, who was then available at the hearing, to take the stand and testify with respect to his account were it necessary. However, through a letter filed subsequent to the conclusion of the hearing, counsel for ALPA now suggests that only 50% of the amount claimed by Senior should be paid.

This panel of the Board heard the section 37 complaint and witnessed the extent and calibre of representation provided by Senior. As a result, even leaving aside ALPA's original concession and its subsequent attempt to withdraw the same (which we need not address here), we are of the view - having regard to the criteria set forth above - that the full amount claimed on behalf of Mr. Senior is both reasonable and payable in the circumstances.

Accordingly, we order the payment of \$38,500 to Eamor for the payment of Mr. Senior's account, plus interest as set forth below.

5. RANKIN AND COMPANY

An account was submitted on behalf of Rankin and Company in the amount of \$2,850 for services rendered by Mr. Harry Rankin. Although Rankin was not called to testify to establish the account, we are satisfied, on the evidence of Eamor and Shortt, and on application of the criteria mentioned above, that Rankin's account was both incurred and reasonable.

Accordingly, we order that the said \$2850.00 be paid to Eamor for the purposes of reimbursing him for the amount paid to Rankin, with interest as set forth below.

6. INTEREST

ALPA argues that interest should not be awarded to Eamor insofar as the Board, not having ordered it initially, is now functus. In the alternative, ALPA argues that no interest should be awarded to Eamor on the amounts he presently owes as opposed to those he actually paid.

Counsel for Eamor argues that interest should be payable to Eamor on the basis of the Board's obligation to make Eamor "whole" with respect to the compensation payable to him regarding the Union's breach of section 37. He argues that unless Eamor is provided with a reasonable interest calculation on the amounts owing to him, he will have lost the "use of the money" he actually paid out and, for the balance of the amounts, he will be subject to the payment of interest for those accounts that now remain outstanding and payable.

Having regard to the circumstances of this case, the Board's obligation to "make whole" the losses incurred by Eamor, and, the labour relations purposes to be achieved and promoted, we are of the view that interest, as a matter of equity, should be paid to Eamor.

In our view, interest on the claims established and ordered to be paid herein, are "rationally connected or related to the breach (of the Code) and its consequences" as envisioned by the Supreme Court in Royal Oak, supra, and reasonably flow from the Board's original order.

Furthermore, we agree that interest should be paid on those amounts established as remaining owing by Eamor (notwithstanding that they have not been paid to date) insofar as we are satisfied that Eamor will be subject to pay interest on said amounts.

The interest to be paid and the method of calculation remains to be determined.

Counsel for Eamor urged that the interest payable should be calculated pursuant to the commonly applied "Snively/Hallowell" method of calculation, which results from the application of this Board's decision in Samuel John Snively (1985), 62 di 112; and 12 CLRB (NS) 97 (CLRB no. 527), and the decision of the Ontario Labour Relations Board's decision in Hallowell House Limited [1980] OLRB Rep. Jan. 35. Both counsel submitted interest calculations to us based on a rate of a 7%; both apparently employed the same method of calculation - that is the Snively/Hallowell method referred to above. Regrettably, the amounts calculated differed. However, it is apparent that counsel have arrived at a relatively common ground with respect to the commencement of their interest calculations on each of the claims proffered. Only the commencement of Eamor's interest claims - which we have dealt with above - needed adjustment. It therefore simply becomes a matter, between them, of recalculating the interest based on those compensatory awards dealt with in this decision. If they cannot agree, it seems a simple task - which in fact is what the Board now directs - for

them to agree upon an independent accountant who will calculate the interest owing on the amounts awarded based on the Snively/Hallowell method.

Accordingly, we order that interest calculated on the Snively/Hallowell method be paid on those accounts that we have directed compensation herein.

7. COSTS RELATED TO THE QUANTUM HEARING

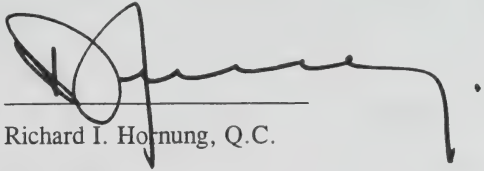
In the present case, the Board is not blind to the Union's abject refusal to resolve or negotiate any aspect of the compensation claims unless they were "strictly proven." Whether posturing or genuine, the Union's position proved to be anything but constructive. In the circumstances, we believe the objectives of the Code are best served by an order requiring that the Union pay Eamor's reasonable costs related to the quantum hearing (Chp. II, no.5).

However, having regard to the fact that approximately two hearing days were taken up with evidence relating to claims (e.g. Finlayson and Eamor) that were either abandoned or substantially reduced in this decision, we are of the view that Eamor's costs related to the quantum hearing should be reduced by 20%.

This leaves only the issue of what amount is to be paid to compensate Eamor for fees and expenses incurred for the quantum hearing. ALPA urged the Board not to make any award in this regard insofar as the claims had not been established and that evidence - including that of Mr. Turiff, Eamor's counsel at the quantum hearing - would be required to establish such claims. Accordingly, we direct that the parties will have 30 days in which to determine, by direct negotiation, the amount of compensation payable to Eamor, pursuant to the above directions, with respect to the quantum hearing.

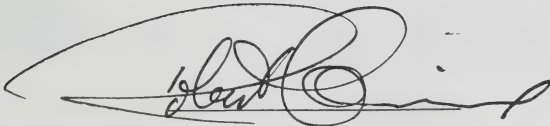
In the event agreement cannot be reached, the Board, pursuant to section 20 of the Code, retains jurisdiction to order a further remedy. If necessary, the issue will be referred to the Board, upon application of either party, for directions with respect to the disposition of the matter.

In light of what we have said here, we are hopeful that further proceedings of any kind relating to the implementation of the Board's orders will not be necessary.

A handwritten signature in black ink, appearing to read "Richard I. Hornung", written over a horizontal line.

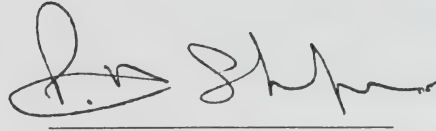
Richard I. Hornung, Q.C.

Vice-Chair

A handwritten signature in black ink, appearing to read "Robert Cadieux", written over a horizontal line.

Robert Cadieux

Member

A handwritten signature in black ink, appearing to read "Patrick H. Shafer", written over a horizontal line.

Patrick H. Shafer

Member

information

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Summary

Richard Connolly et al., *complainants*, Communications, Energy and Paperworkers Union of Canada and its Local 25, *respondents*, Bell Canada, *employer*, and Newco/Entourage Technical Solution and René Roy, *intervenors*.

Board Files: 17379-C (745-05388)
17901-C (745-05601)

CLRB/CCRT Decision no. 1235
September 22, 1998

Unfair labour practice complaints alleging that the Communications, Energy and Paperworkers Union of Canada (CEP) contravened sections 37 and 95(i)(iii) of the Canada Labour Code (Part I - Industrial Relations).

Mr. Richard Connolly filed a complaint alleging that the conduct of the CEP and certain of its representatives in negotiating and concluding the most recent collective agreement contravened the duty of fair representation owed to him and Local 25 members pursuant to section 37 of the Code.

Mr. Connolly and a Mr. Wayne Larmour filed a further complaint against Local 25 of the CEP alleging a violation of section 95(i)(iii) in the latter's decision to deny provision of further financial support for Mr. Connolly's section 37 complaint against CEP. Because the correspondence on file suggested that Mr. Connolly had obtained the remedy sought

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Résumé

Richard Connolly et autres, *plaignants*, Syndicat canadien des communications, de l'énergie et du papier ainsi que sa section locale 25, *intimés*, Bell Canada, *employeur*, et Newco/Entourage Technical Solution et René Roy, *intervenants*.

Dossiers du Conseil: 17379-C (745-05388)
17901-C (745-05601)

CLRB/CCRT Décision n° 1235
le 22 septembre 1998

Plaintes de pratique déloyale de travail alléguant que le Syndicat canadien des communications, de l'énergie et du papier (SCEP) a enfreint l'article 37 et le sous-alinéa 95(i)(iii) du Code canadien du travail (Partie I - Relations du travail).

M. Richard Connolly a déposé une plainte alléguant que, par sa conduite et celle de certains de ses représentants lors des négociations et de la signature de la plus récente convention collective, le SCEP a manqué à son devoir de représentation juste à son endroit ainsi qu'à l'endroit des membres de la section locale 25, aux termes de l'article 37 du Code.

M. Connolly et un certain M. Wayne Larmour ont déposé une autre plainte contre la section locale 25 du SCEP alléguant que cette dernière avait enfreint le sous-alinéa 95(i)(iii) en refusant de continuer à leur accorder du soutien financier relativement à la plainte fondée sur l'article 37 contre le SCEP. Comme la correspondance versée au dossier indique que

in respect of this matter, the Board did not address the matter further.

A week prior to the Board's hearing into the section 37 complaint, the CEP advised the Board of its intention to argue that Mr. Connolly's complaint did not disclose a *prima facie* violation of the Code and should be dismissed. The Board heard argument at the outset of the hearing and took the matter under advisement. Thereafter, the Board notified the parties that the remainder of the scheduled hearing days were cancelled. However, it invited the parties to file further submissions with respect to the investigating officer's report, which they did.

Under section 98, unlike its Ontario counterpart, the Board has a statutory obligation to hear and determine a section 37 complaint. However, pursuant to section 98(2), the Board may refuse to hold a public hearing if satisfied that the information on file is sufficient to determine the complaint, and that a public hearing would not be consistent with the objectives of Part I. In this case, after reviewing the material on file, the Board decided to reject CEP's motion to dismiss the complaint. The Board was satisfied that it had sufficient information to dispose of the merits of Mr. Connolly's complaint without further inquiry.

In an effort to avoid lay-offs and preserve jobs in the wake of Bell Canada's desire to downsize, restructure and contract out, CEP entered into a Memorandum of Understanding with Bell Canada which included, among other things, the recognition by Bell Canada of "Newco", a new company created by CEP representatives to be the preferred supplier of certain services to Bell customers. The

M. Connolly a obtenu le redressement demandé relativement à sa plainte, le Conseil n'a pas approfondi la question.

Une semaine avant que le Conseil instruisse la plainte fondée sur l'article 37, le SCEP a fait savoir qu'il avait l'intention de soutenir que la plainte de M. Connolly ne révélait pas une violation *prima facie* du Code et qu'elle devait donc être rejetée. Le Conseil a entendu les arguments des parties au début de l'audience et a siégé en délibéré. Par la suite, le Conseil a avisé les parties qu'il avait annulé les autres journées d'audience prévues. Il a toutefois invité les parties à lui soumettre d'autres observations portant sur le rapport de l'agent enquêteur, ce qu'elles ont fait.

Aux termes de l'article 98, contrairement à son homologue ontarien, le Conseil doit en vertu de loi instruire une plainte fondée sur l'article 37 et rendre une décision. Toutefois, aux termes du paragraphe 98(2), le Conseil peut refuser de tenir une audience publique s'il est convaincu que le dossier est suffisamment complet pour trancher la plainte et qu'une audience publique serait incompatible avec les objectifs de la Partie I. En l'espèce, après avoir examiné le dossier, le Conseil a décidé de rejeter la motion du SCEP de rejeter la plainte. Le Conseil était convaincu qu'il avait suffisamment de renseignements en main pour instruire la plainte de M. Connolly sur le fond, sans autre enquête.

Afin d'éviter les mises à pied et de préserver des emplois à la suite de la décision de Bell Canada de réduire ses effectifs, de restructurer ses activités et de sous-traiter certaines tâches, le SCEP a conclu un protocole d'entente avec Bell Canada qui incluait notamment la reconnaissance par Bell Canada de «Newco», une nouvelle compagnie créée par les représentants du SCEP, qui deviendrait le

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intention behind the creation of "Newco" was to recover some of the jobs that were expected to be lost in Bell Canada's "Business Transformation process". It is in this context that Mr. Connolly filed his complaints. He alleged that: CEP representatives were in a conflict of interest; the union had failed to provide timely and accurate information regarding Newco; the union did not adequately negotiate certain issues; it abandoned bargaining unit work; and failed to hold a second ratification vote.

Assuming, without deciding for the purposes of the case, that the duty of fair representation does apply to renewal negotiations, the Board would nonetheless have dismissed Mr. Connolly's complaint. The Board reaffirmed that a very restrained approach is taken to examining a union's conduct in the context of the negotiation of collective agreements.

The Board found the allegation of conflict of interest to be unfounded. The decision was not made in an arbitrary fashion, nor was there evidence that it was made in bad faith. The Board also found that the allegation of inaccurate and untimely disclosure was unsubstantiated as there was no evidence that the union purposefully misled or lied to members regarding the Memorandum of Understanding or Newco. Further, the Board found no merit in the complainant's allegation regarding the union's approach to bargaining. Employee dissatisfaction with the bargaining strategies and the choice of bargaining demands will not, in itself, constitute grounds for a complaint under section 37. The Board found no evidence that the union had abandoned its jurisdiction. Finally, the Board held that there

fournisseur privilégié de certains services aux clients de Bell Canada. En créant «Newco», le syndicat voulait récupérer certains des emplois qui devaient être perdus par suite du «processus de transformation de l'entreprise». C'est dans ce contexte que M. Connolly a déposé ses plaintes. Il a allégué ce qui suit: les représentants du SCEP étaient en conflit d'intérêts; le syndicat n'avait pas donné en temps opportun des renseignements exacts concernant Newco; le syndicat n'avait pas négocié certaines questions de façon adéquate; le syndicat avait abdiqué ses responsabilités face à l'unité de négociation et n'avait pas tenu de deuxième scrutin de ratification.

En supposant, sans présumer de l'issue de l'affaire, que le devoir de représentation justifié s'applique aux négociations visant le renouvellement d'une convention collective, le Conseil aurait néanmoins rejeté la plainte de M. Connolly. Le Conseil réitère que c'est avec beaucoup de retenue qu'il examine la conduite d'un syndicat dans le contexte de la négociation de conventions collectives.

Le Conseil conclut que l'allégation de conflit d'intérêts n'était pas fondée. La décision n'avait pas été prise de manière arbitraire, et il n'y avait pas de preuve qu'elle avait été prise de mauvaise foi. Le Conseil conclut également que l'allégation de divulgation tardive de renseignements inexacts n'était pas fondée vu qu'il n'existait aucune preuve que le syndicat avait sciemment induit les membres en erreur ou qu'il leur avait menti au sujet du protocole d'entente ou de Newco. En outre, le Conseil juge que l'allégation du plaignant concernant la conduite du syndicat lors des négociations n'était pas fondée. Le fait qu'un employé soit insatisfait des stratégies de négociation et des choix des revendications syndicales ne constitue pas, en soi, un motif de plainte aux termes de l'article 37. Le Conseil n'a trouvé

was nothing arbitrary, discriminatory or suggestive of bad faith in the union's conduct with respect to the signing of the collective agreement without a second ratification vote.

Mr. Connolly's section 37 complaint is therefore dismissed.

aucune preuve que le syndicat avait abdiqué ses responsabilités. Finalement, le Conseil conclut que le syndicat ne s'était aucunement conduit de manière arbitraire, discriminatoire ou de mauvaise foi en signant la convention collective sans tenir un deuxième scrutin de ratification.

La plainte fondée sur l'article 37 de la Loi sur l'accès à l'information est donc rejetée.

Canada
Labour
Relations
Board
Council
Canadian des
Relations du
Employment

Reasons for decision

Richard Connolly et al.,

complainants,

Communications, Energy and Paperworkers
Union of Canada and its Local 25,

respondents,

Bell Canada,

employer,

and

Newco/Entourage Technical Solution and
René Roy,

intervenors.

Board Files: 17379-C (745-05388)
17901-C (745-05601)

CLRB/CCRT Decision no. 1235
September 22, 1998

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Toronto, Ontario
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Justice C.D. Howe
Barristers' Chambers
Sparks Building
1000 Yonge Street
Toronto (Ontario)
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The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and Ms. Sarah E. FitzGerald, and Mr. David Gourdeau, Members.

A hearing on a preliminary matter was held at Toronto from March 24, 1997, to March 26, 1997.

Reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chairman.

Richard Connolly filed a complaint alleging that his trade union, the Communications, Energy and Paperworkers Union of Canada ("CEP"), contravened the "duty of fair representation" described in section 37 of the Canada Labour Relations Code (Part I -Industrial Relations). Section 37 states:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

CEP is the certified bargaining agent for a unit of craft and service employees of Bell Canada ("Bell") who work in Ontario and Quebec. CEP services the bargaining unit through its locals. The complainant, Mr. Connolly, is a member of Local 25, which provides union representation to Bell bargaining unit employees in the Toronto area (Don Valley to Keele, Lake Ontario to Lawrence). This local had approximately 1400 members in 1995.

Mr. Connolly alleges that the conduct of CEP and certain of its representatives in negotiating and concluding the most recent collective agreement contravened the section 37 duty owed to him and Local 25 members.

Mr. Connolly and a Mr. Wayne Larmour filed a further complaint against Local 25 of CEP, alleging a violation of section 95(i)(iii) of the Code. They challenged Local 25's decision to deny provision of further financial support for Mr. Connolly's section 37 complaint against CEP. Correspondence on file suggests that Mr. Connolly has obtained the remedy sought in respect of this matter. Accordingly, these reasons for decision do not further address the section 95 complaint.

II

In written correspondence to the Board in the week before scheduled public hearings, counsel for CEP advised the Board of its intention to argue that Mr. Connolly's section 37 complaint did not disclose a *prima facie* violation of the Code and should be dismissed.

The Board advised the parties that it would hear argument on this matter at the outset of the public hearing. Following such argument, the Board decided that it would take the matter under advisement. Shortly thereafter, the Board notified the parties that the remainder of the scheduled hearing days had been cancelled.

During oral argument on the question of whether the Board had been presented with a *prima facie* case, the parties indicated degrees of agreement or disagreement with the investigating officer's report. The report had been issued only a few days before the scheduled public hearing, following lengthy but ultimately unsuccessful efforts by the Board's investigating officer to assist the parties to settle the matter. After having taken the motion for dismissal under advisement and cancelling the remaining hearing days, the Board decided that the parties should be provided with an opportunity to respond to the report in writing and to each other's responses if so desired. All parties chose to respond to the report, and the Board also received some additional comments in reply to those responses.

Motion to Dismiss for Lack of *Prima Facie* Case:

At the public hearing, the parties directed their submissions to the question of whether a *prima facie* case had been shown, rather than to whether the Board has the power to dismiss a complaint when it is satisfied that a *prima facie* case has not been made out.

CEP takes the position that the Code permits dismissal on such basis, and suggests that the Board base its decision to dismiss upon the following test adopted by the Ontario Labour Relations Board in General Motors of Canada Limited [1997] OLRB Rep. March/April 210:

"where there is no reasonable likelihood that a complaint can succeed on the facts as alleged

or

where the allegations are insufficient to render reasonable or arguable a conclusion that the Act has been breached "

(page 215)

In the General Motors, supra, a group of employees claimed that their trade union had violated various provisions of the Ontario Labour Relations Act, S.O. 1995, c.1, Sch. A, including those relating to the ratification of collective agreements and a trade union's duty of fair representation. At a public hearing, the trade union requested that the complaint be dismissed on the basis that it did not disclose a *prima facie* case for the remedies requested. The employer supported the application and asked the Ontario Board to exercise its discretion under section 96(4) of the Labour Relations Act, to decline to inquire into the complaint. Section 96(4) of that Act reads as follows:

" 96(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of the Act ... "

(emphasis added)

The discretionary power of the Ontario Board to decide whether or not to inquire into a complaint is to be contrasted with Parliament's direction to the Canada Labour Relations Board in section 98 of the Canada Labour Code (Part I):

" 98. (1) Subject to subsection (3), on receipt of a complaint made under section 97, the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part.

(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

(emphasis added)

When read in its entirety, section 98 suggests that:

- (1) the Board must hear and determine all section 37 complaints. The exception, specifically noted, is the discretion in section 98(3) to refuse to hear and determine complaints that could be referred to arbitration; and
- (2) of those complaints that the Board must hear and determine, section 98(2) provides a residual discretion, in respect of section 37 complaints only, to refuse a public hearing if satisfied that such public hearing is not consistent with the objectives of Part I of the Code. In such cases the Board would hear and determine the matter by way of what in the

language of administrative tribunals is known as a "file" hearing. The Board panel could meet once or on several occasions in the form of file hearings before making its final determination of a complaint.

In Harry Finley (1993), 91 di 213 (CLRB no. 1009) the Board reached much the same conclusions with respect to the proper interpretation of section 98. In that case, the Board was faced with an unusual situation where much of what the complainant sought in the way of relief had been granted to him in another related section 37 complaint. Nonetheless, the Board stated that it could not simply refuse to hear the second complaint. It explained its reasons for this view.

"...The Code says in section 98(1) that where a section 37 complaint is not settled, the Board shall hear and determine it. The Board thus cannot simply ignore such a complaint; it must respond to it, in the final analysis, by hearing it and determining it. This does not mean that the hearing process must be a public one; section 98(2) does give the Board the discretion to dispense with a public hearing if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part. What this usually means in practice is that where the Board comes to such an opinion, the hearing and determination mentioned in 98(1) are carried out on the basis of the written submissions of the parties, which are deemed to be sufficient to give the Board the factual picture required to deal appropriately with the matter.

The Board's utilization of its discretion not to hold a public hearing has almost invariably occurred where the factual picture which emerges clearly from the written submissions of the parties shows that the section 37 complaint is without merit, either because it is untimely or because there simply is no evidence of discrimination, arbitrariness or bad faith to give prima facie support to the complaint. Normally, where the submissions suggest the possibility that the complaint may have merit, the Board schedules a hearing, although there is no particular reason why it ought to do so."

(pages 216-217)

In Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRB no. 515) the Board set out its views regarding the legislative intent

behind section 98(2) (then section 188(1.1)). The main reason identified by the Board for Parliament's removal of the need for a public hearing in certain circumstances was to alleviate the financial burden being inflicted upon bargaining agents who were required to defend themselves before the Board in response to section 37 complaints. Section 98(2) permits the Board to screen out the complaints which, in its opinion, can be disposed of without a hearing.

In Gordon Duncan McCance, *supra*, the Board also outlined some of the circumstances in which the Board would use its power to dispense with a public hearing. It indicated that before the Board decides whether to waive a public hearing in any given complaint, it will ensure that it has before it all of the facts and circumstances that it would become aware of if it were to go to a public hearing. Therefore, in situations where the complaint appears to be without merit but the union has failed to respond to it, the Board has been constrained to convene a public hearing. (See for example: Peter Elcombe (1992), 88 di 222; and 17 CLRBR (2d) 294 (CLRB no. 953); and Leonard William Zilinski, January 3, 1995 (LD 1384), wherein the Board referred to this practice.)

Thus, unlike the Ontario Labour Relations Board, this Board does not have the statutory discretion to refuse to hear a complaint. Rather, its discretion is limited to the power to refuse to hold a public hearing in situations where the written material on the file is sufficient to enable it to make a decision on the matter. (On this point, see also: Harry Finley, *supra*; Peter Elcombe, *supra*; and Leonard William Zilinski, *supra*).

For this reason, parties to complaints under section 37 are notified that the Board may exercise its discretion to determine the matter without a public hearing. This is to ensure that submissions to the Board are full and complete and that the Board has everything before it that it would hear if it proceeded to a hearing. Complainants are encouraged to state all the grounds for the complaint and provide all documentation,

as they bear the burden of proof in section 37 complaints. Similarly, trade unions should provide a full response to the complaint as insufficient or questionable responses usually lead the Board to inquire further into the matter, often by way of a public hearing. This is costly and time-consuming for all concerned and sometimes, as it turns out, unnecessary.

A respondent who disputes the sufficiency of the alleged grounds or supporting facts should provide a timely written communication of the details of such a position to the Board's officer, with any supporting arguments or documentation it thinks it is necessary to provide. In this way, the respondent's position becomes part of the written file, responded to by the complainant if he or she so wishes and noted in the Board's officer's report. A panel of the Board may then consider all issues that have been raised by the parties, with the benefit of their full submissions.

It is implicit that at its file hearings, the Board considers the sufficiency of the alleged grounds and facts. As mentioned before, the complainant bears the burden of proof in section 37 complaints. The burden of proof has sometimes been described in terms of the requirement to establish a *prima facie* case (see for example: Harry Finley, *supra*; and Leonard William Zilinski, *supra*). The Board has also described it in terms of the requirement to adduce sufficient "material facts" to establish a violation of the Code (Bryan Hines, August 5, 1997 (LD 1719)) and the presentation of "tangible" proof of a violation (Peter Klippenstein (1991), 86 di 33 (CLRB no. 889)).

If, at the time of its file hearing, the Board concludes that the grounds or facts alleged by the complainant are insufficient to show a violation of the Code, the Board may dismiss the matter by way of a letter decision addressed to the parties. Or, the Board may determine that further inquiry is warranted, and seek additional information through written submissions or by way of a public hearing. It is the Board that decides upon the extent of the information it requires to determine the complaint.

In scheduling a public hearing, the Board is indicating that it wishes to make further inquiry before any final determination of the complaint is made. Nonetheless, even where a public hearing has been scheduled, the Board may, in appropriate circumstances, conclude that the continued time and expense is no longer necessary or warranted in order to properly and fairly determine the complaint. (See: Peter Klippenstein, supra)

It is this panel's decision to reject CEP's dismissal motion and to proceed to determine the complaint on its merits.

The Board has reviewed the file again, paying particular attention to Mr. Connolly's complaint as outlined in his written submissions to the Board, clarified at the public hearing in Toronto, and supplemented in responses concerning the investigating officer's report. The submissions of the parties on file and at the hearing are lengthy and detailed. The Board is satisfied that the parties have been provided with an opportunity to make full submissions and that the Board has been provided with ample information upon which to base its decision.

The Board is satisfied that the merits of Mr. Connolly's complaint may now and should be determined without public hearing or further inquiry. The expense and time of a public hearing is not warranted or consistent with the objectives of Part I of the Code. Accordingly, the Board exercises its discretion to refuse a public hearing on the merits.

Following, then, are the Board's reasons for decision in the matter of Mr. Connolly's section 37 complaint against CEP.

III

In much of the spring and summer of 1995, the CEP was engaged in preparatory work for collective bargaining with Bell Canada, which was scheduled to commence in the early fall of 1995. Renewal bargaining was to take place for both the Craft and Services, and Operator Services bargaining units that CEP represents. Among the problems which loomed on the horizon of these negotiations was the issue of lay-offs.

In March 1995, the company's CEO served notice that significant changes were coming. A corporate decision had been announced that 10,000 jobs were to be eliminated by the end of 1997 and that a considerable amount of Bell Canada's work would be reorganized.

According to the March 1995 edition of the Bell News (an internal newsletter for Bell employees), the company had begun an era of "Business Transformation". This concept was regarded by Bell Canada as a means to achieve reductions by disposing of unnecessary work and reducing costs in a logical and structured way in order to improve service. In the same newsletter, employees were advised that Bell Canada would do everything possible to treat the employees affected by these cuts with respect and dignity and provide career planning and counselling to those whose jobs were changed or abolished.

The CEP took Bell Canada's position seriously. Up until 1995, the CEP had managed to avoid lay-offs of its members. However, by the end of the summer of 1995, senior CEP executives had accepted that Bell Canada was determined to divest itself of certain types of work and/or at least attempt to dismantle certain elements of existing non "value-added" operations. There had been some discussion of Bell's plans to turn several of its departments into separate Bell subsidiaries. Moreover, Bell had previously applied to the CRTC to be relieved of its exclusive obligation to provide inside wiring service. The CRTC rendered a decision which would permit customers

to choose the company that would do inside wiring work. The decision would take effect February 1, 1996, and allow Bell to charge for inside wiring work from the "demarcation line" inward, at a rate of \$91.00 an hour. In the view of CEP and many others, the CRTC decision effectively granted Bell the opportunity to exit from the inside wiring work as most other telephone companies had already done.

In late August 1995, the CEP was putting together its collective bargaining package. The process culminated in a four-day conference involving delegates from all the individual CEP locals. The purpose of the convention was to examine and discuss the bargaining proposals received from each of the CEP locals in order to achieve a consensus on bargaining demands.

On the first day of the conference, an idea was proposed by Richard Long ("Long"), CEP Ontario Administrative Vice-President, to recover some of the jobs that were expected to be lost in the Business Transformation process. In its written submissions, the CEP describes the idea Long had in the following way:

"Long proposed that the Union ask the Solidarity Fund (the Quebec labour investment fund) to provide capital to set up a company that would do the work that Bell was getting out of (e.g. inside wiring and class 2 PBX/key work). This company would then employ surplus Bell employees, inevitably at lower wages, but CEP could represent the employees and negotiate union wages, benefits and pensions. The union would need to get some sort of commitment from Bell for cooperation in ensuring the company had a supply of work."

According to the CEP, the initial reaction to the proposal was mixed. Quebec delegates generally viewed it positively while Ontario delegates were cool to it. By about the third day of the conference, delegates learned that Bell Canada had formally announced that it was devolving several of its departments and creating separate subsidiaries. According to the CEP, this information had a chilling effect on many participants at the conference. There was considerable anxiety among the delegates

that Bell Canada might be able to side-step its contractual obligations to the affected employees. This was, in part, fuelled by the view that certain work, if devolved to subsidiaries, could leave the federal labour relations jurisdiction and move into the provincial arena.

On the last day of the conference, Long re-tabled the idea of establishing a "solidarity company". The delegates voted and decided to allow Long and René Roy ("Roy"), Vice President of CEP Québec, to explore the issue and report back to the union. By the end of the conference the delegates had assembled a set of bargaining demands. However, the formation of a "solidarity company" was not among them.

In September, the face of Bell Canada's "Business Transformation" was beginning to emerge. Bell Canada's Construction and BNI departments were about to form a separate company, needing only two-thirds of the existing departmental workforce. A similar situation had developed in the Logistics and Material, and Building Maintenance departments. A new subsidiary would employ a staff about 40% the size of these existing Bell Canada departments. Moreover, Bell anticipated losing up to 80% of the market in inside wiring as a result of the \$91.00 per hour rate it would charge.

CEP submitted that it was determined to prevent what its representatives viewed as the break-up of Bell Canada. One of the key issues in collective bargaining was Bell Canada's proposal to revise Article 11 of the collective agreement to allow the company to contract out even while employees were on lay-off. Article 11 prohibits the use of contractors while bargaining unit employees are on lay-off. Conversely, for CEP, "employment security" was a principal bargaining focus. CEP was determined to ensure that lay-offs would be limited to the lowest possible number.

During October and November 1995, CEP and Bell Canada were engaged in negotiations. Bell Canada was unwavering in its desire to get out of performing much of the work that it was then engaged in, including inside wire installation and repair.

Aside from their involvement in collective bargaining, Long and Roy were also busy in their separate side project studying the creation of the "solidarity company", examining the strengths and weaknesses of the proposed venture. This study was undertaken with representatives of the Solidarity Fund (Quebec) and Bell Canada.

On November 16, 1995, Long and Roy made a presentation to the union bargaining committee on the results of their study. A number of representatives of the Solidarity Fund attended. It was explained that the Solidarity Fund could set up a company as a separate organization to operate independently of Bell Canada and perform the service of inside wiring installation and maintenance. The idea was that this company would enter into an exclusive arrangement with Bell Canada to perform this work. The company would hire Bell Canada's surplus employees. Those who had already opted for the voluntary separation package could also be hired. Ultimately, it was explained that certain aspects of this arrangement would require CRTC approval.

Long and Roy also outlined for the bargaining committee a potential global settlement which would not only include the creation of the new company to recapture the inside wiring work, but would also resolve the issues associated with the creation of subsidiaries as part of the aforementioned "Business Transformation" of the Construction, BNI, Logistics and Material, and Building Maintenance departments.

On the subject of a new company to recapture the inside wiring work, Long and Roy presented a document concerning this "Solidarity Project". It began:

- *"The Solidarity Project follows Bell Canada's decision to exit the inside wiring installation and maintenance business.*
- *The Fonds de Solidarité des Travailleurs du Québec (FSTQ), in cooperation with the Communications, Energy and Paperworks Union of Canada and a group of management employees from Quebec and Ontario, have assessed the opportunity of setting up a new business (Newco) whose purpose would be to provide, as the preferred supplier, Bell Canada customers with all services listed under 1.3.*
- *This document outlines the main terms of reference for a partnership agreement to be concluded between Bell Canada and Newco, and which would allow the latter to begin providing services starting on or about February 1st 1996."*

The date of February 1, 1996, was critical. This was the effective date of the CRTC order permitting Bell Canada in effect, to devolve, *inter alia*, the inside wire installation and maintenance work from its operations. The general feeling, based on experiences at BC Tel and Télébec, was that if CEP did not attempt to take some kind of action, many employees would lose their jobs. CEP representatives saw little other legitimate recourse available.

The new company contemplated by the Solidarity Project became known as Newco. In 1996, Newco became known as "Entourage". However, during the remainder of the collective bargaining period it was simply Newco.

On November 23, 1995, Long and Roy presented the Newco project to a group of delegates from all CEP locals. Long and Roy provided the delegates with details of the project and underscored the fact that a fundamental goal of Newco was to prevent job loss by CEP members who could be subject to lay-off at Bell. Moreover, the Newco project was to form part of a global settlement which would resolve significant outstanding issues with Bell Canada in connection with the collective agreement and the newly created subsidiaries. However, in order to meet the deadline of February 1, 1996, it was felt that the global collective bargaining

settlement would have to be finalized by December 1995, with the ratification process to be completed by early January 1996.

The idea was endorsed by the delegates of the CEP locals. With this endorsement two things occurred:

- i) the Solidarity Fund entered into negotiations with Bell Canada for the creation of Newco. CEP representatives had input into issues of wages, employee selection and establishing the "demarcation point" for work between Newco and Bell Canada. Essentially the "demarcation point" is the point where the "outside" line effectively becomes the "inside" line. (This point may be different in a single line residential service compared to a multi-line business service.)
- ii) the CEP bargaining committee adopted the Newco project as part of its bargaining strategy. The effect of the creation of Newco upon the "no contracting-out" provisions of Article 11 was addressed through negotiations. An understanding was reached that any work on Newco's side of the "demarcation point" would not be considered contracted out work under Article 11, but any other work picked up from Bell Canada would be subject to Article 11.

Collective bargaining continued into December 1995. By December 21, 1995, a tentative global settlement was reached, resolving bargaining issues for both the Craft and Services, and Operator Services bargaining units represented by CEP. With respect to the issue of Newco, the following Memorandum of Understanding was signed on December 20, 1995:

"1. Newco will carry out the activities previously performed by the Company and described in the appropriate sections of the Service Agreement to be concluded between the Company and Newco.

2. The business and operations of Newco will be independent from those of the Company, and the employees represented by the Union in Newco's bargaining units will be entirely separate from the employees and bargaining units of the Company.

3. The activities pursued and the work performed by Newco will not be considered to be work of the bargaining units of the Company."

Also included in the global settlement was a Letter of Intent stating, with respect to potential lay-offs, that conditional upon: (1) the creation of the subsidiary operations; (Construction/BNI and Logistics) (2) the creation of Newco; and (3) the success of voluntary separation programs:

"...the Company does not anticipate a need to resort to the Force Adjustment provisions contained in Article 11 over the term of the current collective agreement."

On December 21, 1995 the bargaining committee met and voted to recommend the global settlement to its membership.

Ratification meetings were held in the first two weeks of January 1996. In the complainants' local (Local 25), two meetings occurred. The first one was on January 3, 1996, which was actually the local's monthly meeting. The topic of Newco was discussed. A few days later a 17-page document entitled "Bargaining Report" was circulated to the membership. It contained information concerning, *inter alia*, the operation of Article 11 on work to be performed by the subsidiary companies. There was also a covering letter which stated that the following two conditions had to be met prior to the signing of the collective agreement:

"1 - by January 17, 1996, an overall acceptance of the Collective Agreements by the majority of members who vote; and,

2 - the approval of the CRTC to move their Feb. 1/96 decision (which allowed Bell Canada to charge \$91/hour for inside wire work) to June 1/96, and the subsequent finalization of the transaction for the establishment of the new company, Newco."

Approval to move the effective date of the CRTC decision from February 1, 1996, to June 1, 1996, was requested as it was thought that it would take the new company some time to become operational.

The second meeting, the ratification meeting, was held on January 10, 1996. Approximately 200 of the 1400 members of the local attended. According to the CEP, the Bargaining Report document was reviewed in detail. By January 12, 1996, the ratification vote was completed. Half of Local 25 had cast ballots. When the overall polling was tabulated, there was 85% acceptance of the global collective agreement.

Nonetheless, questions were emerging, particularly out of Local 25, concerning the establishment of Newco and the effect it would have on employees who had opted for voluntary separation packages back on September 30, 1996, but who would now be able to apply to work at Newco.

Then, another event occurred which had a significant impact on the process. On January 29, 1996, the CRTC disallowed the request to push back the effective date of its order from February 1, 1996, to June 1, 1996. Apparently, this surprised representatives from both Bell Canada and the CEP.

On January 31, 1996, a conference call was held between all local presidents of CEP to discuss what should be done in light of the CRTC decision. The discussion centred on the pros and cons of pushing forward and signing the global collective agreement

compared with returning to the bargaining table. A vote was taken. Local 25's representative stated that the global collective agreement should not be signed. He voted to return to the bargaining table. A majority of the other locals, however, felt otherwise. To them, returning to the bargaining table had too many potential pitfalls. At the end of the meeting, the local presidents had voted to accept the collective agreement despite the CRTC decision.

On January 31, 1996, the collective agreement was implemented.

On April 3, 1996, Bell Canada's Group Vice-President prepared a memorandum entitled "Workforce Planning Update" in which he stated:

"Based on the successful adoption of these measures and the analysis of our workforce to date with Bell's 3 Year Plan objectives, I feel confident that we will be able to get through the next two years without the need to resort to permanent layoffs."

The CEP and Bell Canada submit that, as of the Board's public hearing, no lay-offs have occurred.

Newco, or Entourage as it is now called, employs over 800 former Bell Canada employees. These people were previously in the CEP bargaining unit at Bell. No union officials function as Entourage managers or sit on its Board of Directors.

IV

The Issues in this Complaint

The complainant's allegations may be grouped into the following five main issues:

- (1) conflict of interest - the complainant alleges that the CEP representatives, and, in particular, René Roy and Richard Long, were in a conflict of interest with respect to the creation of the new company and the representation of the bargaining unit members;
- (2) late and misleading disclosure to union members regarding the Newco project - the complainant alleges that the union failed to provide timely information to the bargaining unit members and that the information that it did provide with respect to the creation of the new company was misleading;
- (3) failure to explore and propose alternative bargaining proposals and failure to engage in hard bargaining - the complainant alleges that the union did not adequately negotiate the issue of job security and alternatives to lay-offs;
- (4) the abandonment of bargaining unit work - the complainant alleges that the CEP abandoned its jurisdiction over "non-core" work at Bell Canada;
- (5) failure to hold a second ratification vote - the complainant alleges that, given that one of the conditions for the first ratification was not filled (the CRTC agreement to postpone the effective date of its earlier decision), the CEP was required to hold a second ratification vote. This was not done.

The Board will address each of these categories in turn. However, it is necessary to deal first with the preliminary issue of the Board's jurisdiction to consider section 37 complaints in the context of the negotiation of collective agreements.

The Application of the Duty of Fair Representation to the Negotiation of Collective Agreements

The duty of fair representation has been included in the Canada Labour Code since 1978. In 1984, amendments were made to the Code which included changes to the

wording of the provision dealing with the duty of fair representation. The Board's decisions on this issue have thus come to be divided into two major groups: (1) those which were made before 1984, when the old text of the duty of fair representation applied; and (2) those which were made since 1984, when the new text was enacted.

Until 1984, the Board held that the duty of fair representation applied to collective bargaining (see for example: Stanley Warner (1982), 51 di 146 (CLRB no. 403); Nelson G. Burrows et al. (1984), 57 di 205 (CLRB no. 488); and G. Len Larmour et al. (1980), 41 di 110; and [1980] 3 Can LRBR 407 (CLRB no. 260)). After July 1985, when the wording of the duty of fair representation in the Code was amended, the first few decisions of the Board dealing with the new wording removed collective bargaining from the ambit of section 37 (Gordon Parsley et al. (1986), 64 di 60; 12 CLRBR (NS) 272; and 86 CLLC 16,018 (CLRB no. 555); Nordair Ltd. (1986), 64 di 118 (CLRB no. 560); Terry Wilson et al. (1986), 66 di 201 (CLRB no. 583); and John Brown et al., August 29, 1986 (LD 556)).

Subsequently, the Board ruled that the duty of fair representation applied to mid-term negotiations which result in letters of understanding (or other such ancillary agreements) (George Harris et al. (1986), 68 di 1; 15 CLRBR (NS) 328; and 86 CLLC 16, 059 (CLRB no. 597); and Dan Reid et al. (1992), 90 di 58 (CLRB no. 972)). The rationale for this conclusion was that a section 37 complaint which challenges the validity of an ancillary document does not put the entire collective agreement in jeopardy.

Then, in Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607); and G  rard Racine et al. (1993), 92 di 118 (CLRB no. 1026), the Board made statements in *obiter* which effectively extended the reach of the duty of fair representation to the negotiation of first contracts and negotiations for the renewal of collective agreements.

The present case deals with complaints arising out of the negotiation of a Memorandum of Understanding which was concluded within the context of

negotiations for the renewal of a collective agreement as part of global settlement. The Memorandum of Understanding essentially provided an exemption for work to be performed by Newco employees from the application of Article 11 of the collective agreement. It stipulated that the work done by Newco employees which was on Newco's side of the demarcation line would not be considered to be contracted-out work for the purposes of Article 11.

We are of the view that despite its separate documentary existence, the Memorandum of Understanding does not stand or fall independently of the collective agreement. The evidence satisfies us that the agreement reflected in the Memorandum of Understanding was key to the achievement of a global settlement by the parties that addressed not only preservation of the protective wording of Article 11, but also the creation of several subsidiaries and the terms and conditions of work that would apply to employees of them, as well as certain bargaining demands relating to Operator Services. Assuming, without deciding for purposes of this case, that the duty of fair representation does apply to these renewal negotiations, we would dismiss Mr. Connolly's complaint on its merits in any event, for the following reasons.

Scope of the Duty of Fair Representation in the Context of Collective Bargaining

The starting point for any analysis regarding the scope of the duty of fair representation must be the Supreme Court of Canada decision in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509. In that case, the Court enunciated a set of principles which govern the duty of a union to fairly represent its members:

- "1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 527)

However, the application of the above-cited principles in the context of collective bargaining procedures must be considered in the light of the principles the Board has enunciated in its decisions. The Board has, in the past, clearly indicated that it will take a very restrained approach to examining a union's conduct in the context of the negotiation of collective agreements. In the post-1984 case of Dan Reid et al., *supra*, the Board expressed that the principles enunciated by the Board in the pre-1984 decisions regarding this restrained approach still apply today. In that regard, the Board stated:

*"... we once again draw on Peter G. Reynolds et al., *supra*, where the Board traced the evolution of the Board's policies and practice regarding the duty of fair representation as it relates to negotiations. A key decision referred to there is G. Len Larmour et al. (1980), 41 di 110; and [1980] 3 Can LRBR 407 (CLRB no. 260), where the Board dismissed a similar complaint involving the run through agreements which were negotiated by the Brotherhood of Locomotive Engineers and CN Rail in 1980. It was there that the Board, after reviewing cases in other jurisdictions in Canada as well as in the United States,*

adopted the reasoning that the authority of trade unions as exclusive bargaining agents must be allowed a wider degree of latitude in negotiations than in contract administration. That is still the essence of the Board's policies today. Unless there are clear signs of unlawful motives or of prohibited conduct which includes arbitrariness, discrimination or bad faith, this Board will not interfere in the free collective bargaining process through its supervisory role under section 37 of the Code. The Board will certainly not second-guess bargaining agents about the reasonableness or the correctness of the critical choices they have to make when attaching priority to contract items that are on the bargaining table, nor will the Board tell them what items they should or should not have put there.

A common thread that winds its way through most of the writings on this topic is the universal acceptance that complete satisfaction of everyone who is affected by the negotiations of a collective agreement is virtually an impossibility. Inevitable differences will always arise. No matter what approach a union adopts, the decisions taken will favour some and others will not approve. While these differences may be very real, they do not in themselves form the basis for a complaint under the duty of fair representation provisions of the Code. For there to be a breach of the Code, there has to be some evidence of unlawful conduct on the union's part."

(pages 63-64)

Thus, the general attitude towards union decisions in the context of the negotiation of collective agreements is one of deference to union discretion. The union does not control the content of what is negotiated. It is the result of mutual accommodation with the employer. This must be taken into account when considering complaints involving the duty of fair representation in a bargaining context.

We turn now to the issues raised by the complainant in his complaint.

I. Alleged Conflict of Interest

The complainant contended that the CEP representatives were more interested in the creation of Newco and the Solidarity Fund's investment in Newco than in the CEP membership and the preservation of the members' rights under Article 11 of the collective agreement. The complainant also alleged that René Roy, a representative of the CEP, was in a direct conflict of interest as he sat on the Board of Directors of the new company.

In denying the allegation of conflict of interest, the CEP argued that its involvement in the creation of Newco was necessary in order to obtain the maximum benefits for the membership. Furthermore, Newco necessarily had to be created by the efforts of the union since its sole raison d'être was to solve the crisis facing the union and its members during the negotiation of the collective agreement.

A union and its representatives place themselves in a conflict of interest when they seek to further their own interests or those of the union to the detriment of an employee or a group of employees without due regard for the interests at stake, or when they do so in bad faith (Brian L. Eamor (1996), 101 di 76; 39 CLRBR (2d) 14; and 96 CLLC 220-039 (CLRB no. 1162) at pages 96; 36; and 143,377). However, the mere appearance of a conflict of interest in the absence of any evidence of bad faith or discriminatory or arbitrary conduct does not give rise to a breach of the duty of fair representation (Ronald K.J. Mah (1991), 86 di 27 (CLRB no. 888); and C.U.P.E. Local 67, C.U.P.E. National, The Corporation of the City of Sault Ste. Marie, [1993] OLRD No. 3675 (October 8, 1993)).

In the present case, the Board is satisfied that in negotiating the Memorandum of Understanding neither the union nor its representatives sought to further their own interests to the detriment of, or without due regard for, the employee interests at stake. There has never been any allegation that the respondent trade union

"financed" Entourage or that Entourage was created by the respondent trade union. There are no union officials functioning as Entourage managers or sitting on its Board of Directors.

In addition, there is no evidence that René Roy or Richard Long were ever officers with Newco. Indeed, it is unlikely that they would have been, given that this company never existed. Similarly, there was no evidence that Roy and Long were ever officers of the Entourage company.

At the hearing, it was acknowledged that Mr. Roy was a member of the Board of Solidarity Fund. That fact in and of itself does not establish, in the Board's view, a conflict of interest with respect to the duty of fair representation. Without doubt, Mr. Roy's involvement with the Fund was of assistance in raising and communicating the idea of a solidarity company to the CEP bargaining committee and later, to Local representatives, at a time when the union was considering its options and exploring ways to avoid lay-offs in the face of significant downsizing at Bell. However, and for the reasons set out herein, as we are satisfied that the conduct of the trade union itself meets the requirements of the section 37 duty of fair representation, the mere fact of Mr. Roy's involvement with the Fund is, in our view, of no consequence in this case.

The Board accepts that union officials involved in the discussions about Newco and supporting it were acting in the interests of the bargaining unit as a whole. CEP believed that this project would provide jobs in a unionized workplace to Bell surplus employees. It was expected that this would then eliminate the need for lay-offs which would, in turn, permit the union to resist the employer's demands for amendments to Article 11 of the collective agreement. Indeed, the employer provided a Letter of Intent indicating that, arising from the creation of Newco (as one of the pre-conditions), it was unlikely that the employer would need to apply the Force Adjustment provisions of the collective agreement during its term. Thus

Newco was part of the solution to the issue which was central to this round of bargaining: the union's desire to avoid lay-offs and preserve jobs in the face of Bell's desire to downsize, restructure and contract out.

The Board finds that the union carefully considered the situation that was before it and decided that the best option to ensure continued employment for the employees in the bargaining unit was to support the creation of Newco. The decision was not made in an arbitrary fashion, nor is there any evidence that it was made in bad faith. This is discussed further in point III below.

As such, the Board finds that the allegation that the union and its representatives were in a conflict of interest is unfounded.

II. Alleged Late and Misleading Disclosure

The complainant made numerous allegations with respect to the CEP's disclosure of information about the Newco project. They are as follows:

- (1) that the CEP misled the membership in late August 1995 by failing to disclose, in a general public manner, the efforts under way at the time to examine the feasibility of setting up Newco;
- (2) that from September 1, 1995, to November 10, 1995, the CEP representatives failed to disclose anything about the Newco project in its Negotiation Bulletin Updates. By failing to do so, the membership was led to believe that the CEP representatives were holding fast on Article 11 when in fact they were discussing ways to work around the language vis-a-vis the Newco project;

(3) that the CEP representatives did not meet their duty to disclose the consequences of not going forward with the Newco project;

(4) that, with respect to the ratification vote held in January 1996, the CEP intentionally failed to provide the members with the factual information necessary to make an informed choice about whether to ratify the collective agreement or not;

(5) that the information given at the moment of ratification did not include the fact that the Newco agreement with Bell Canada required, as a condition of Newco's favoured status, that the collective agreement between Bell Canada and the CEP be ratified.

With regard to the first and second allegations, the evidence reveals that the idea of Newco was not raised until August 28, 1995, when it was proposed by Richard Long during the union's bargaining caucus. In September 1995, the "solidarity company" was an idea to be explored. A workable proposal for Newco was developed shortly before November 16, 1995, when it was presented to the union bargaining committee. It was not until November 23, 1995, that the union locals through their delegates endorsed the idea, after which the general membership learned of it.

With respect to the third, fourth and fifth allegations, the Board finds no evidence that the union intentionally misled the membership or intentionally failed to provide adequate, timely information to the membership about the substance of the Newco project. The members were provided with sufficient information to know that the Newco project was an integral part of the global settlement between the parties and that if the Memorandum of Understanding with respect to Newco was rejected, the global settlement would fail. Days before the ratification meeting the Bargaining Report was distributed to the membership providing time for the members to review

the document and come to the meeting if they chose to do so, with knowledge of the issues.

The Board notes that in at least five separate communications with the members, the union mentioned Newco and in several of these communications detailed information about the project was provided. For example, in a newsletter dated November 28, 1995 the union explained that Newco had been created to recapture the work that Bell Canada was either abandoning or contracting out and that the new company would provide work for CEP members. In this newsletter, the union also indicated to the membership that those workers who went to Newco would be working for a new employer in a new bargaining unit under provincial labour legislation, and that all working conditions would have to be negotiated.

At the December 1995 monthly membership meeting, Local 25's vice-president, Mike Farewell, made a presentation on Newco. He explained that many of the union members might be without a job as a result of the company's decision to abandon inside wiring work. He further explained that this was why the union had decided to become involved in discussions for the creation of Newco together with the Solidarity Fund and Bell.

On December 15, 1995, Rory Hawes, Local 25's bargaining representative, sent a letter to Local 25's stewards giving an overview of the relationship between Bell, Newco and the CRTC. In this letter he stated:

"...[The Solidarity Fund] didn't convince Bell it was a good idea to get out of the business, Bell made that decision on their own! Bell is one of the last major telephone companies to dump this work, and the few that still do it won't much longer. This is something that doesn't seem to be understood among the local membership.

...Many have said, to hell with it, we have article 11, let them lay off. Well, what they don't understand is that without a strike, we won't have that tough article 11 soon. The proposed contract [by Bell] will have language that guts

article 11. We can fight it on the streets, and maybe will, or we can avoid layoffs by sending surplus to Newco. ... "

Further, in an invitation to the membership to attend a membership meeting on January 3, 1996, the union indicated its intention to discuss "the latest news, especially "Newco", and bargaining".

Finally, in its 17-page Bargaining Report, the union discussed Newco under the heading of Employment Security.

The Board does not find inadequate the information provided to the union membership and union officials which explained Newco and the implications of taking a position with the company. While it may not have been entirely clear that the Memorandum of Understanding constituted an exception to Article 11, the Board finds that, in the context of all the information provided to the members, the implications of the creation of Newco and its impact on employment security and Article 11 would have been quite apparent to employees wishing to inform themselves on the matter.

That employees may not have clearly understood the information communicated to them or that it was not clearly communicated would not in any event necessarily lead to a breach of the duty of fair representation; the misrepresentation must be intentional (J. Abramowitz et al., [1987] OLRB Rep. April 455). Communication which is found to be less than thorough or not completely precise will not constitute a breach of the duty unless it is purposely untruthful or misleading (Salvatore Di Cesare, [1987] OLRB Rep. May 692, at page 695; and The Great Atlantic and Pacific Company, [1983] OLRB Rep. Oct. 1654).

In the present case, there is no evidence that the union purposefully misled or lied to the members regarding the Memorandum or Newco. The evidence falls far short of establishing that certain information was deliberately withheld from the membership

in order to mislead them. Thus, the situation in the present case is quite unlike that in Diamond "Z" Association, [1975] OLRB Rep. Oct. 791. In that case, the Ontario Labour Relations Board held that the duty of fair representation was violated when the union misrepresented to members that a wage settlement would be retroactive knowing that it would not, and subsequently executed a collective agreement. The fact that, in the present case, the information provided to the employees may not have been understood by all does not constitute a violation of the duty of fair representation.

Thus, the Board finds that the allegation of late and misleading disclosure is unsubstantiated.

III. Failure to Explore Alternative Means of Achieving Competitiveness and Failure to Engage in Hard Bargaining

The complainant alleged that the CEP failed to investigate and follow up on alternative measures which might have addressed Bell Canada's desire to reduce costs related to the workforce. The complainant contended that an example of one such alternative was the negotiation of lower wages for the existing employees of Bell Canada. It was argued that this would have obviated the need to create Newco and even, perhaps, other subsidiaries.

The complainant further submits that the CEP failed to consider the option of setting up new classifications to allow Bell Canada to become more competitive. Instead, it gave the membership the impression that the CEP intended to preserve Article 11 by making it costly and complicated for Bell Canada to lay off employees.

Finally, the complainant alleges that once the CEP representatives wove the Newco project into the collective bargaining process, no "hard bargaining" took place.

As was previously noted, wide latitude is given to unions in setting and pursuing bargaining strategies (G. Len Larmour et al., supra, at pages 121; and 415). The union, as exclusive bargaining agent, has a mandate to negotiate on behalf of the employees in the unit. It is entitled to determine which bargaining demands it will or will not bring to the table and which strategies and tactics it will adopt in advancing the interests of the bargaining unit (Claude Paquet (1985), 59 di 149; and 85 CLLC 16,053 (CLRB no. 496) at pages 160; and 14,352). The Board will not second guess the bargaining agent's choice of the items it put on the negotiating table. Critical choices must be and were made about how to approach a particular problem and the Board will not examine the propriety of the union's decision in that regard (Dan Reid et al., supra, at pages 62-63).

Similarly, in adjudicating fair representation claims concerning negotiations, the Board will not attempt to assess whether the union has achieved the best or most equitable balance or whether the bargain obtained had a comparative advantage. Nor will the Board attempt to assess whether the union obtained the best possible agreement with the employer or whether the union should have bargained harder. If the process and the result of the decision are free of improper motive and evince some objective justification, the union will have fulfilled the duty of fair representation (Peter Reynolds et al., supra).

Looking at this complaint in the foregoing context, the Board is of the view that the union's decision is objectively justifiable and free from any improper motive. The evidence revealed that the union based its decision to negotiate the creation of Newco on its perception that wage rates were not the primary reason that Bell was not competitive in providing certain services. The union officials understood that a big part of the problem was Bell's high overhead costs. Thus, in the union's view, it was not a solution to the problem to simply propose lower wages or new classifications in order to save jobs. The Board finds that this explanation of the rationale behind the union's bargaining strategy demonstrates that the decision to

negotiate the creation of Newco was not arbitrary, but rather, was based on careful analysis and reflection.

Moreover, the evidence clearly reveals that a prime bargaining strategy of Bell was to change Article 11 so that it would be able to contract out work previously done by Local 25 members when employees were on lay-off. If they succeeded in that regard the work would likely be lost and the members would lose their jobs.

The Board accepts that the union viewed itself as being in a very difficult situation: it needed to come up with a proposal that would both prevent the amendment of Article 11 so that the other members of the bargaining unit could continue to benefit from this clause and, at the same time, deal with the expected loss of work, and therefore, the union's loss of jobs and members.

A justifiable compromise was found. Article 11 would not be amended and Newco would be created to provide jobs to former Bell employees. This appears to the Board to be an innovative and resourceful solution to a real labour relations problem. The Board finds that the CEP could justifiably maintain the position that Article 11 provided an important protection and work strenuously to ensure its survival during the negotiations while at the same time negotiating an exception to this provision for the work to be done by Newco.

It may well be that the solution which the union came up with did not meet with the approval of all of the employees in the bargaining unit. The process of collective bargaining almost inevitably results in the disappointment of certain employees (G. Len Larmour et al., *supra*, at pages 121; and 415; and Claude Paquet, *supra*, at pages 161; and 14,353). However, employee dissatisfaction with the bargaining strategies and the choice of bargaining demands will not, in itself, constitute grounds for a complaint under section 37.

In the result, the Board finds the complainant's allegation regarding the union's approach to bargaining and its demands to be without merit.

IV. Abandonment of Bell Bargaining Work

The complainant alleges that the CEP, at the behest of Bell Canada, abandoned its jurisdiction to "non core" work at Bell Canada, including work performed in large centres like Toronto and Montréal.

The Board is satisfied that the union believed Bell Canada would effectively exit the inside wiring and maintenance market once the CRTC decision took effect. Certainly Bell would be under pressure to reduce the number of employees assigned to this work. It was clear to the union that several hundred jobs would be lost.

The fact that in the complainant's view other options existed, such as forcing the employer to apply its costly and complicated lay-off procedure or seeking reclassification of the work or wage reductions, does not mean that the union, in choosing to support the creation of Newco, "abandoned" jurisdiction over the bargaining unit work. The evidence amply demonstrates that the union responded quickly and in a reasoned fashion to ensure that hundreds of employees who could lose their jobs would obtain good work in a unionized workplace.

The Board finds therefore that the union did not abandon its jurisdiction; it sought to protect the interests of its members in very difficult circumstances.

V. Failure to Hold a Second Ratification Vote

The complainant took the position that CRTC approval of the change to the implementation date of its order was a condition of the ratification given by the

union membership of the proposed global settlement. When this condition was not met, the proposed settlement was, in his view, no longer ratified and had to go back to the members for another vote. It was alleged that the union's failure to hold a second vote constituted a breach of section 37.

This Board has, in past decisions, indicated that it has no power to interfere in respect of such internal matters as the way in which ratification takes place, or indeed in respect of whether there is any membership ratification at all (Nelson G. Burrows et al, (1984), 57 di 205 (CLRB no. 488) at 215; Raymond M. Laking (1996), 101 di 71 (CLRB no. 1161) at pages 73-74; Dennis Dohm (1983), 52 di 160 (CLRB no. 439) at page 164). The decision as to whether membership ratification is necessary and the manner in which it is conducted is primarily the business of trade unions. It is only when there is evidence that the union has acted dishonestly or in bad faith that the Board may intervene. Thus, for example, in the case of Interior Systems Contractors Association of Ontario, [1995] OLRB Rep. Aug. 1082, the Ontario Labour Relations Board intervened in a case where the responsible union official was purported to have ratified a collective agreement containing wage rollbacks, after informing the members that he would not do so without their further involvement.

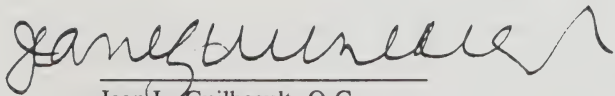
In this case, the membership was told that CRTC approval of the postponement of the February 1, 1996, rate change was necessary before the agreement would be signed. The union explained to the Board that the reason this approval was needed was that it would take some time to get Newco, a large unknown company spread across two provinces, operational. However, according to the respondent, when the CRTC refused the postponement on January 29, 1996, the need for the postponement was alleviated by Solidarity Fund's negotiation of improved rates with Bell for Newco's first months of operation. With this, the Solidarity Fund felt confident that Newco would be viable and could promptly commence business as planned. Consequently, in the view of the CEP Executive the condition of CRTC approval of the postponement became unnecessary.

The CEP made a considered decision that it would not go back to the membership for a second ratification vote and would instead provide the representatives of the local with an opportunity to vote on the matter. The union consulted representatives of the locals on January 31, 1996, as to whether it should carry through with the global settlement or return to the table. While Local 25's representative stated that he thought the union should return to the table, a significant majority of locals stated that they were in favour of carrying through with the global settlement and that the alternative of returning to the table was worse. Thus, through its representative, Local 25 had a say in the decision. The fact that this representative was overruled by the majority does not constitute a violation of section 37. The Board finds that there was nothing arbitrary, discriminatory or suggestive of bad faith in the union's conduct with respect to the signing of the collective agreement without a second ratification vote. There was no requirement that a second ratification of the membership vote be held.

Conclusion

For all of the reasons detailed above, the Board concludes that the complainant has not succeeded in establishing that the union violated section 37 of the Code. The complaint is therefore dismissed.

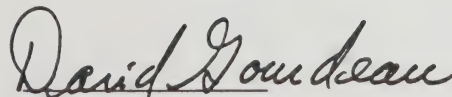
This is a unanimous decision.



Jean L. Guilbeault, Q.C.
Vice-Chairman



Sarah E. FitzGerald
Member



David Gourdeau
Member

information

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Summary

Teamsters Local Union No. 31, *applicant*,
and Brewery Creek Mine, o/a Viceroy
Mines, *employer*.

Board File: 18823
CLRB/CCRT Decision No.: 1236
October 16, 1998

This decision deals with an application filed pursuant to section 109 of the Code for an order granting the Union's authorized representatives access to employees living on the Employer's premises near Dawson City in order to solicit union memberships.

In early June 1998, employees at the mine contacted the Union requesting that representatives come to Dawson City to conduct an organizing campaign. The Viceroy mine site is approximately 70 km from Dawson City and is located approximately 20 km off the Dempster Highway. The mine operates from April to October every year and during that time it can be accessed by motor vehicle. There are three shifts consisting of approximately 30 employees each, and they rotate on a two-week-on and one-week-off basis. Each shift has approximately 8 employees (roughly 25% of the employee complement) who fly out of Dawson City immediately after their shift is completed. Hence, there are, in the present case, two distinct groups of employees: (1) employees who travel by automobile and (2) employees who fly in

Résumé

Le syndicat Teamsters No. 31, requérant, et
Brewery Creek Mine, o/a Viceroy Mines,
employeur.

Dossier du Conseil: 18823
CLRB/CCRT Décision No. 1236
le 16 octobre 1998

La présente décision se rapporte à une demande fondée sur l'article 109 du Code en vue d'obtenir une ordonnance accordant aux représentants autorisés du syndicat l'accès aux employés vivant dans des locaux appartenant à l'employeur près de Dawson City, dans le cadre d'une campagne de recrutement syndical.

Au début de juin 1998, les employés de la mine ont demandé au syndicat d'envoyer des représentants à Dawson City pour organiser une campagne de recrutement. La mine Viceroy se trouve à 70 km environ de Dawson City et à quelque 20 km de la route Dempster. La mine est exploitée chaque année du mois d'avril au mois d'octobre et est accessible pendant cette période par véhicule automobile. Il y a trois quarts de travail, comprenant environ 30 employés chacun, qui font la rotation, à raison de deux semaines de travail suivies d'une semaine de congé. Immédiatement après chaque quart, quelque 8 employés (ce qui représente à peu près 25 % de l'effectif) prennent l'avion à Dawson City. Par conséquent, il y a, en l'occurrence, deux

and out of Dawson City. The Union's "organizing campaign" started with the representatives holding two private meetings, and then parking their camper 7 km from the entrance to the mine site, hoping that it would entice prospective members who traveled by road to stop and obtain information about the Union. Their efforts met with little success. The Union, therefore, filed an application pursuant to section 109 of the Code.

The Board stated that section 109 is designed to strike a balance between the Employer's property interests and the employees' right, enshrined in section 8(1) of the Code, to join the union of their choice. In addition to the provisions dealing with basic freedoms and the acquisition of bargaining rights, section 109 provides for a derogation of property rights in certain circumstances in order to translate the freedom of association into a meaningful right. The section provides not only that the employees must live in an isolated location on premises owned or controlled by the employer, but also that access would otherwise be both impracticable and reasonably required for certain stated purposes; one of which relates to soliciting union memberships. Face to face contact

groupes distincts d'employés : (1) ceux qui voyagent en automobile et (2) ceux qui utilisent l'aéroport de Dawson City. Les représentants du syndicat ont lancé la « campagne de recrutement » en organisant deux réunions privées et en stationnant ensuite leur camionnette de camping à 7 km de l'entrée du site de la mine dans l'espoir que cela inciterait les membres éventuels qui voyageaient en voiture à s'arrêter et à demander des renseignements au sujet du syndicat. Leurs efforts n'ont pas été couronnés de succès. Le syndicat a donc déposé une demande fondée sur l'article 109 du Code.

Le Conseil déclare que l'article 109 vise à concilier les intérêts de propriété de l'employeur et le droit des employés, énoncé au paragraphe 8(1) du Code, d'adhérer au syndicat de leur choix. Outre les dispositions se rapportant aux libertés fondamentales et à l'acquisition des droits de négociation, l'article 109 permet de déroger aux droits de propriété dans certaines circonstances afin de faire du droit d'association un droit effectif. L'article stipule non seulement que les employés doivent vivre dans un lieu isolé, dans des locaux appartenant à leur employeur ou

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with employees is required for such purposes. The question then is whether or not this access would be impracticable unless permitted on the employer's premises. The practicability or impracticability of face to face contact with the employees in question should not be confused with an evaluation of whether or not the union's campaign might be successful without an order pursuant to section 109.

The applicant should establish that conventional means, available to the union, of organizing the employees in question are, or would be, unavailable or that reasonable attempts at conventional means of organizing the employees in question have not provided, or would not provide, the face to face contact, which section 109 is designed to ensure. As for the first group, the Board was not satisfied that the Union had established that access to these employees was impracticable, since the only real attempt at contact with the employees, prior to the filing of the present application, was by means of parking their camper at the roadside for less than 24 hours. However, for the second group, access to these employees would be impracticable unless permitted on the Employer's premises pursuant to section 109. Indeed, experience dictates that it simply is not realistic to expect, even if time were available, that employees using employer arranged transportation would stop at the roadside on the way out of the mine site to meet with the union's representatives at their camper. The Board

placés sous sa responsabilité, mais aussi que l'accès doit pratiquement être impossible ailleurs et qu'il doit se justifier par certaines fins établies, dont une campagne de recrutement. Le contact personnel avec les employés est nécessaire pour réaliser un tel objectif. La question à trancher consiste donc à déterminer si cet accès serait pratiquement impossible si on ne permettait pas au syndicat d'avoir accès aux employés dans les locaux de l'employeur. La possibilité ou l'impossibilité sur le plan pratique d'avoir un contact personnel avec les employés concernés ne devrait pas être confondue avec les chances de succès de la campagne si l'ordonnance fondée sur l'article 109 était refusée.

Le requérant doit établir que les moyens conventionnels, dont dispose le syndicat, pour recruter les employés visés ne sont pas, ou ne seraient pas, utilisables, ou que les efforts raisonnables déployés pour utiliser les moyens disponibles afin de syndiquer les employés ne permettent pas, ou ne permettraient pas, le contact personnel que l'article 109 vise à assurer. En ce qui concerne le premier groupe d'employés, le Conseil n'était pas convaincu que le syndicat avait établi que l'accès à ces employés était pratiquement impossible, étant donné que le seul moyen qu'il avait réellement pris pour établir un contact avec ces employés, avant le dépôt de la présente demande, s'était limité à stationner la camionnette de camping en bordure de la route pendant moins de 24 heures. Toutefois, l'accès au second

was of the opinion that since an order was necessary for the second group of employees it should issue for all.

groupe d'employés aurait été pratiquement impossible à moins d'obtenir l'autorisation de les rencontrer dans les locaux de l'employeur, en conformité avec l'article 109. De fait, on sait d'expérience qu'il est tout simplement irréaliste de croire que, même s'ils en avaient le temps, des employés utilisant les moyens de transport fournis par l'employeur s'arrêteraient en bordure de la route en sortant du site de la mine pour rencontrer les représentants du syndicat à leur camionnette. Le Conseil a conclu que, puisqu'il lui fallait émettre une ordonnance concernant le second groupe d'employés, aux fins de relations de travail, il devait englober tous les employés.

Reasons for decision

Teamsters Local Union No. 31,

applicant,

and

Brewery Creek Mine, o/a Viceroy Mines

employer.

Board File: 18823

CLRB/CCRT Decision no. 1236

October 16, 1998

The Board was composed of Mr. Richard I. Hornung, Q.C., Ms. Suzanne Handman, Vice-Chairs, and Ms. Roza Aronovitch, Member.

Appearances

Mr. Lyle Kent and Mr. Don Evans; for the Applicant; and
Mr. Colin G.M. Gibson and Mr. Roy Flower; for the Employer.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., and Ms. Suzanne Handman, Vice-Chairs.

I

The Union filed an application pursuant to section 109 of the Code for an order giving its authorized representatives access to employees living on the Employer's premises near Dawson City, Yukon, for purposes of soliciting union memberships. For the reasons set out below, the application is granted.

II

The Viceroy mine site is approximately 70 km from Dawson City and is located approximately 20 km off the Dempster Highway. The mine operates from April to October each year and during that time it is accessible to the employees by ordinary vehicular traffic. While it is in operation, the employees - i.e. the production crews - that the Union is targeting for membership at the mine, live at the mine site and work on a shift basis. There are three shifts consisting of approximately 30 employees each. Two teams remain on site and work on a daily basis. They rotate on a two-week-on and one-week-off basis; the shift changes occur every Monday morning. When these shift changes occur, the employees going on shift do not have an opportunity to meet with or speak to those employees coming off their shift. For the most, the employees' entire day and evening is taken up by their employment obligations, prior and post-work tasks, dinner and rest.

Each shift has approximately 8 employees - comprising roughly 25% of the employee complement - who fly out of Dawson City immediately after their shift concludes. Upon their arrival and at their departure, these employees are transported to and from the airport by a taxi service arranged by Viceroy. Although they have a 40-minute wait at the airport prior to departure, there is no realistic or reasonable opportunity there for the Union to contact them for the purposes of soliciting union memberships.

The balance of employees on each shift live in and around Dawson City, while a small number commute to Whitehorse. While some employees live in traditional homes, others live in campers or in tents. These employees travel to and from the mine site by motor vehicle. Since shift changes occur on Mondays, the highest incidence of employee traffic on the mine site road, logically so, occurs on that day.

III

In early June 1998, employees at the mine contacted the Union requesting that representatives come to Dawson City to conduct an organizing campaign. As a consequence, the Union sent Mr. Lyle Kent, its Director of Organizing, as well as Mr. Don Evans, its Business Agent, to Dawson City to conduct the campaign.

The Union's "organizing campaign" essentially consisted of the representatives holding two private meetings with selected individual employees and then making enquiries concerning the circumstances of employees who worked at the mine. Thereafter, from Thursday night until Saturday morning - when they departed because of a representative's ill health- they parked their camper truck approximately 7 km from the entrance to the mine site. This was done with a view to enticing prospective members who travelled the road to stop and obtain information about the union. Their efforts met with very little success. Although the representatives subsequently remained on the road until Saturday, the Union prepared the present application, and gave instructions to file it, within 24 hours after they first parked their camper. No other attempts were made to organize the targeted employees.

IV

Section 109 of the Code provides as follows:

*"109.(1) Where the Board receives from a trade union an application for an order granting an authorized representative of the trade union access to **employees living in an isolated location on premises owned or controlled by their employer** or by any other person, the Board may make an order granting the authorized representative of the trade union designated in the order access to the employees on the premises of their employer or such other person, as the case may be, that are designated in the order if the Board determines that access to the employees*

(a) would be impracticable unless permitted on premises owned or controlled by their employer or by such other person; and

- (b) *is reasonably required for purposes relating to soliciting union memberships, the negotiation or administration of a collective agreement, the processing of a grievance or the provision of a union service to employees."*

(emphasis added)

Section 109 is designed to strike a balance between the Employer's property interests and the employees' right, enshrined in section 8(1) of the Code, to join the union of their choice. This point was made by the Board in Dome Petroleum Ltd. and Canadian Marine Drilling Ltd. (1980), 40 di 150; and [1980] 2 Can LRBR 533 (CLRBR no. 252), where it observed:

"The purpose and necessity of section 199 [now section 109] need not be reviewed here. It was canvassed at length in Dome Petroleum Ltd., 27 di 653; [1978] 1 Can LRBR 393; and 78 CLLC 16,129. In that case we reviewed the antecedents to section 199 in Canada and described it as a limited derogation of property rights. We described our role as one of balancing property rights against the right of non-employees to gain access for the purposes expressed in section 199(1)(b)(ii)."

(pages 156; and 538)

The Ontario Labour Relations Board took a similar view in relation to section 11 of the Ontario Labour Relations Act, R.S.O. 1980, c. L-2, an access provision similar to section 109 of the Code. In The Adams Mine, Cliffs of Canada Ltd., Manager, [1982] OLRB Rep. Dec. 1767, Chairman Adams (as he was then) said the following:

"It is to be noted that the statute provides a more specific and different balance between an employer's property interest and the right of non-employees to solicit union membership from employees on company property. In this regard, section 11 provides that where employees of an employer reside on the property of the employer, the employer when directed by the Board, shall allow a representative of a trade union access to the property for the purpose of attempting to persuade the employees to join a trade union. Therefore, the statute acknowledges the right of an employer to raise his property rights against strangers to the employment relationship even though the strangers are union organizers and their involvement on company property during the non-working time would not interfere with any bona fide management

interest. The attempt here is to accommodate the right of property and the right to organize 'with as little destruction of one as is consistent with the maintenance of the other'. See N.L.R.B. v. Babcock and Wilcox Company (1956), 38 LRRM 2001 at 2004..."

(pages 1779-1780; see also to the same effect Michelin Tires (Canada) Limited, [1979] 2 Can LRBR 388 (N.S.), pages 402-403)

The principle of freedom of association and the protection of the right to organize are recognized by the Code. In addition to the provisions dealing with basic freedoms and the acquisition of bargaining rights, section 109 of the Code provides for a derogation of property rights in certain circumstances in order to translate the freedom of association into a meaningful right. As the Board stated in Dome Petroleum Limited et al. (1977), 27 di 653; [1978] 1 Can LRBR 393; and 78 CLLC 16,129 (CLRB no. 112):

"... It is for us to determine the scope of the circumstances in which property rights must give way to the collective bargaining interests sanctioned in the Code. The rationale for the change is clear. Employees have rights under the Code, but history has shown that those rights are usually only translated into a meaningful exercise of them when employees are informed of them, the method of exercising them and the benefits to be derived from their exercise. Representatives of established trade unions are the common vehicle for purveying this information. Consequently, union representatives may gain access to employer property if it is necessary to communicate with employees. ..."

(pages 675-676; 410; and 412)

In assessing the balance to be achieved, and prior to granting an order that derogates from an employer's property rights, the Board must direct its mind to the specific requirements that must be met under section 109. The section provides not only that the employees must live in an isolated location on premises owned or controlled by the employer, but also that access would otherwise be both impracticable **and** reasonably required for certain stated purposes, one of which relates to soliciting union memberships.

The concept of impracticability is directed at the ease of establishing face-to-face contact with the employees; the concept of reasonableness is directed at the purposes for which

access is sought (see Dome Petroleum Limited et al. (112), *supra*, at pages 677; 411; and 413; and Dome Petroleum Limited et al. (1978), 31 di 189; [1978] 2 Can LRBR 518; and 78 CLLC 16,153 (CLRBR no. 153), at pages 204; 529-530; and 590). The Board, on a number of occasions, has considered the requisite criteria for access and, in particular, what is meant by the concepts of impracticability and reasonableness.

With respect to the latter notion, while it is possible to solicit union membership by mail or by phone, the Board has held that face-to-face contact is required in most industries:

"... For the purpose of soliciting union membership, the physical presence of a union representative who can answer questions about the union, its operation and administration, and the obligations and benefits of membership, is reasonably required."

(Dome Petroleum Limited et al. (153), *supra*, pages 204; 530; and 590; see also Ledcor Industries et al. (1998), 41 CLRBR (2d) 145 (CLRBR no. 1225))

In our view, there is little doubt that, in this case, face-to-face contact with the employees in question is reasonably required for purposes of soliciting union memberships.

The question then is whether or not this "face-to-face" access to the employees would be "impracticable" unless permitted on the employer's premises. In Dome Petroleum Limited et al. (153), *supra*, the Board defined "impracticable" as follows:

"The shades of different connotation between 'impracticable' and 'impractical' are that the former's connotation is one of near impossibility whereas the latter is merely that access without an order would not be a practicable proposition. The choice of the word 'impracticable', makes the test more restricted. That this was deliberately intended is reflected in the French text by the use of the phrase 'pratiquement impossible,' rather than 'impratique'. In deciding whether access is impracticable we must consider the available means or means in the near future of contacting the employees, remembering that for the purpose of soliciting '... we consider that face to face contact is required in most industries...' "

(pages 204; 529; and 590)

While we question whether or not access must be a "near impossibility" as suggested in Dome Petroleum Limited et al. (153), *supra*, it is nevertheless clear that the test is more restrictive than simple impracticability.

That the employees in the present case live in an isolated location, is not in doubt. However, an order pursuant to section 109 is not forthcoming "for the asking" simply because the employees live in an isolated location; nor does it follow that isolation alone would make access to employees other than at the employer's premises impracticable. The practicability or impracticability of face-to-face contact with the employees in question here should not be confused with an evaluation of whether or not the Union's campaign might be successful without an order pursuant to section 109. Ours is not to provide the Union with an organizing advantage or an assurance of success. We are concerned only with whether or not the Union has established that face-to-face access to the employees, within the strictures of section 109, is impracticable without an order from the Board.

In the present case, there are two distinct groups of employees whose particular circumstances must be addressed in determining whether or not face-to-face contact, for the purposes envisioned in section 109, is impracticable without an access order: (1) those who travel to the mine site by automobile from the area in and around Dawson City; and (2) those who travel by air to and from Dawson City.

1. Employees Who Travel by Automobile

In the past, Board orders under section 109 have been largely issued in circumstances where access to the employees' workplace is restricted entirely to means of transportation controlled by the employer. In this case, access to the workplace is accessible to the employees by ordinary motor vehicle. The employees, even though they live on site for two weeks and work a 12-hour shift, are nevertheless free to leave the work site after their

shift is completed. And, in fact, the evidence disclosed that some employees take advantage of that opportunity.

That fact notwithstanding, the Union spent only two full days attempting to organize the employees prior to filing its application. Most of that was spent in an unmarked camper truck on the road leading to the mine site. It did not attempt to contact those employees who were on their week off or otherwise call a meeting in Dawson City, which could possibly have been attended both by employees on and, with some difficulty, off shift. While the failure to do either of the above may be understandable in the circumstances, the same does not hold for the Union's attempts at roadside organizing. Having determined to make their camper at the roadside the major focus of the organizing drive, the representatives spent only 24 hours parked there attempting to organize the employees prior to giving instructions for filing its section 109 application.

Although they remained on the roadside following the filing of their application, the representatives abandoned their efforts on Saturday with the observation that very few vehicles actually stopped to meet with them on the roadway. However, the Union - for valid reasons - abandoned its efforts prior to the shift change on Monday when all the employees involved in the shift change would travel the road, and when the greatest likelihood of employee contact would occur.

Although the language of section 109(1)(b), by using the future tense "would be," directs the Board toward a prospective interpretation, we are nevertheless free to look at past circumstances to assist us in arriving at a conclusion as to whether or not access to the employees in question is, practically speaking, impracticable. In deciding whether access is impracticable we must, as indicated earlier, consider the available means or means in the near future of contacting the employees on a face-to-face basis. That determination - like the determination of whether or not the location is an isolated one - depends on the circumstances of each case. In our view, it is appropriate in the present circumstances - where access is otherwise available than through passage provided by the employer - to look at the Union's organizing attempts prior to bringing the present application.

In circumstances such as the present, where face-to-face access is possible with those employees who travel to and from the workplace by automobile, and the workplace is accessible to the employees other than by means controlled by the employer, the applicant should establish that conventional means, available to the union, of organizing the employees in question are, or would be, unavailable or that reasonable attempts at conventional means of organizing the employees in question have not provided, or would not provide, the face-to-face contact that section 109 is designed to ensure.

In our view the Union, considering that the only real attempt at contact with the employees, prior to the filing of the present application, was by means of parking their camper at the roadside for less than 24 hours, has not demonstrated, to this point, that access to the employees who travel to and from the mine site by private vehicle was impracticable for the purposes of soliciting union memberships.

2. Employees Who Fly In and Out of Dawson City

The same conclusion, however, does not hold true for the balance of the employees who fly in and out of Dawson City. The realities of access to these employees is determinative.

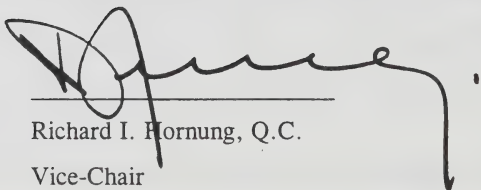
Approximately 25% of employees fly in and out of Dawson City prior to and following each shift change. As indicated, the employees are driven by employer arranged transportation to and from the airport. They fly in and out of Dawson City on scheduled airline flights. On arrival, they are met by their transportation and immediately head for the mine site. On departure, they have only 40 minutes between their arrival at the airport, check-in and the departure of their flight. Experience dictates that it simply is not realistic to expect, even if time were available, that employees using employer arranged transportation would stop at the roadside on the way out of the mine site to meet with the Union's representatives at their camper. Nor does the time available at the airport provide a reasonable or realistic opportunity for the Union to achieve the face-to-face contact for purposes of soliciting memberships, which section 109 envisions. In short, we are

satisfied that the Union has demonstrated that access to these employees would be impracticable unless permitted on the Employer's premises pursuant to section 109.

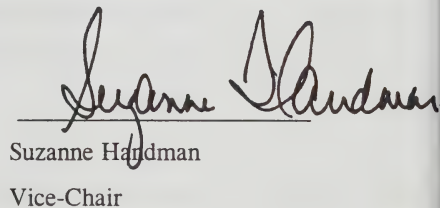
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Notwithstanding our reservations with respect to those employees who live in and about Dawson City, an order pursuant to section 109 is clearly required for that 25% complement who fly in and out of Dawson City. It only makes labour relations sense that if an order, pursuant to section 109, is to issue for any employees, it must issue for all of them. Accordingly, the application is granted.

The parties requested that we not specify the terms of access in order to allow them to negotiate the same. Accordingly, pursuant to section 20 of the Code, the Board will maintain jurisdiction with respect to defining the terms of access, in order to allow the parties a reasonable opportunity to agree to the same. In the event an agreement cannot be reached, either party may bring the matter before the Board.



Richard I. Hornung, Q.C.
Vice-Chair

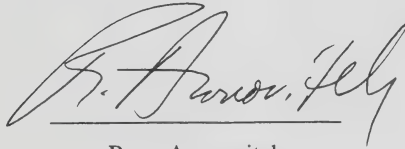


Suzanne Hardman
Vice-Chair

Concurring Reasons

While I concur with my colleagues in their reasons for decision, I would add the following regarding the standard to be adopted by the Board in construing the term "impracticable" within the meaning of section 109 of the Code. What the Board

judges to be impracticable in any instance must depend on the facts and the circumstances of the case. In addition, the term can only find labour relations sense when considered by reference to the objects of the Code and the bargaining rights it seeks to protect. Having said that, and considering the plain meaning of "impracticable" and its statutory translation: "pratiquement impossible", the term cannot nearly be equated with or construed as merely impractical, difficult or inconvenient. It must, in my view, be given an interpretation which is substantially more restrictive.

A handwritten signature in cursive script, appearing to read "R. Aronovitch", written over a horizontal line.

Roza Aronovitch

Member



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information

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Summary

Empire International Stevedores Ltd., Westcan Stevedoring Ltd., Canadian Stevedoring Company Limited, Western Stevedoring Company Limited, Westcan Terminals Ltd., TimberWest Forest Limited - Stuart Channel Wharves Division, as represented by the British Columbia Maritime Employers Association, *applicants*, and International Longshoremen's and Warehousemen's Union, Canadian Area, International Longshoremen's and Warehousemen's Union, Local 503, International Longshoremen's and Warehousemen's Union, Local 504, and International Longshoremen's and Warehousemen's Union, Local 508, *respondents*.

Board File: 17908
CLRB/CCRT Decision no. 1237
November 23, 1998

Résumé

Empire International Stevedores Ltd., Westcan Stevedoring Ltd., Canadian Stevedoring Company Limited, Western Stevedoring Company Limited, Westcan Terminals Ltd., TimberWest Forest Limited - division Stuart Channel Wharves, représentés par la British Columbia Maritime Employers Association, *requérants*, et Syndicat international des débardeurs et magasiniers, section canadienne, Syndicat international des débardeurs et magasiniers, section locale 503, Syndicat international des débardeurs et magasiniers, section locale 504, et Syndicat international des débardeurs et magasiniers, section locale 508, *intimées*.

Dossier du Conseil: 17908
CLRB/CCRT Décision n° 1237
le 23 novembre 1998

The applicants, stevedoring companies and general wharf operators, filed an application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) seeking to review and consolidate the bargaining units on Vancouver Island. Said units are currently represented by the three respondent Locals of the ILWU.

Les requérants, des compagnies de débardage et des exploitants portuaires, ont présenté une demande fondée sur l'article 18 du Code canadien du travail (Partie I — Relations du travail) en vue de faire réviser les unités de négociation sur l'île de Vancouver dans le but de les regrouper. Les unités en question sont actuellement représentées par les trois sections locales intimées du SIDM.



The applicants claim that the existing units are no longer appropriate, and that a single Island-wide bargaining unit for each applicant-employer would be appropriate. The applicants argue that there are structural problems associated with the existence and operation of three dispatch offices on Vancouver Island; namely, that the existence of three separate dispatch offices has caused labour shortages and has resulted in a mismatch of the supply of labour to the needs of the industry. The Respondent Locals operate a separate dispatch office in their geographic area to service the work allocated within each Local's geographic jurisdiction.

The respondent Locals submit that a successful section 18 application would undermine the multi-employer province-wide bargaining structure which has been in place on a voluntary basis since 1972. (Since 1972, the parties have been bound by a single common collective agreement negotiated between the ILWU-Canadian Area and the BCMEA.) A successful application, they claim, would result in six separate certification orders for the companies operating on Vancouver Island. Consequently, each bargaining unit would have the right to negotiate a separate collective agreement and eventually a separate right to strike. They further submit that the application is without a labour relations purpose. They argue that the dispatching problems do not arise from the existing collective bargaining structure, but rather flow from the provisions of the collective agreement that regulate the dispatch system. In their view, this problem should be resolved at the bargaining table and not through a section 18 application for review of the bargaining unit structure.

Les requérants prétendent que les unités actuelles ne sont plus habiles à négocier qu'une seule unité de négociation regroupant les employés de l'île pour chaque employeur. Le requérant serait appropriée. Les requérants soutiennent que l'existence de trois bureaux de répartition sur l'île de Vancouver pose de problèmes structurels; plus particulièrement, l'existence de ces trois bureaux a causé des pénuries de main-d'œuvre et a donc empêché d'assortir l'offre de main-d'œuvre aux besoins du secteur. Les sections locales intimées ont chacune un bureau de répartition dans leur région géographique pour effectuer le travail relevant de la compétence géographique de chaque section locale.

Les sections locales intimées soutiennent qu'il y a fait droit à la demande fondée sur l'article 18 minerait la structure de négociation multipatronale, qui a été mise en place à l'échelle provinciale sur une base volontaire depuis 1972. (Les parties sont liées depuis par une seule convention collective commune négociée par le SIDM-section canadienne et la BCMEA.) Il en résulterait six ordonnances d'accréditation distinctes pour les compagnies exploitant une entreprise sur l'île de Vancouver. Par conséquent, chaque unité de négociation aurait le droit de négocier une convention collective distincte et, en bout de ligne, le droit de faire grève séparément. Les sections locales intimées soutiennent en outre que la demande n'a pas été présentée à des fins de relations de travail. Elles prétendent que les problèmes de répartition ne découlent pas de la structure de négociation actuelle mais plutôt des dispositions de la convention collective qui régissent le système de répartition. À leur avis, le problème pourrait être résolu à la table de négociation plutôt que par une demande de révision des unités de négociation fondée sur l'article 18.

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Considering the parties' current situation, the operation of the longshoring industry on Vancouver Island, bearing in mind its peculiarities, the Board concludes that the existing bargaining structure is no longer appropriate.

Before granting the application, however, the Board seeks the parties' submissions on the following issues: (1) the way the bargaining structure should be amended; and (2) the application of section 34 of the Code to the instant case. Because the conditions for a geographical certification appear to be met, the Board is of the view that such a solution should be considered.

Compte tenu de la situation actuelle des parties, du fonctionnement du secteur du débardage sur l'île de Vancouver et de ses particularités, le Conseil conclut que la structure de négociation actuelle n'est plus appropriée.

Toutefois, avant de faire droit à la demande, le Conseil demande aux parties de présenter des observations sur les questions suivantes : (1) la façon dont la structure de négociation devrait être modifiée; et (2) l'application de l'article 34 du Code en l'espèce. Étant donné que les conditions pour une accréditation géographique semblent avoir été remplies, le Conseil est d'avis qu'une telle accréditation devrait être envisagée.

Reasons for decision

Empire International Stevedores Ltd., Westcan Stevedoring Ltd., Canadian Stevedoring Company Limited, Western Stevedoring Company Limited, Westcan Terminals Ltd., TimberWest Forest Limited - Stuart Channel Wharves Division, as represented by the British Columbia Maritime Employers Association,

applicants,

and

International Longshoremen's and Warehousemen's Union, Canadian Area, International Longshoremen's and Warehousemen's Union, Local 503, International Longshoremen's and Warehousemen's Union, Local 504, and International Longshoremen's and Warehousemen's Union, Local 508,

respondents.

Board File: 17908
CLRB/CCRT Decision no. 1237
November 23, 1998

The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, and Messrs. Michael Eayrs and Patrick H. Shafer, Members. A public hearing was held in Victoria, British Columbia, on October 20-23, 1997.

Appearances

Mr. Thomas A. Roper, counsel, assisted by Mr. Michael Wagner, co-counsel and Mr. F.A. Pasacrete, Vice-president, Operations, for the applicants;

Mr. Bruce A. Laughton, counsel, assisted by Mr. Tom Dufresne, President, ILWU, Mr. R. Nagel, President, ILUW, Local 503, Mr. B.R. Hartley, President, ILWU, Local 504 and Mr. A. Russell, President, ILWU, Local 508, for the respondents.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chair.

- I -

The present decision deals with a section 18 application filed on February 7, 1997, by six employers and their representative. The Applicants are: Empire International Stevedores Ltd., Westcan Stevedoring Ltd., Canadian Stevedoring Company Limited, Western Stevedoring Company Ltd., Westcan Terminals Ltd. and TimberWest Forest Limited - Stuart Channel Wharves Division, and the British Columbia Maritime Employers' Association, their representative.

The section 18 application seeks to review and consolidate the bargaining units on Vancouver Island that are represented by ILWU Locals 503, 504 and 508. The Applicants seek a determination that the existing units represented by the three Locals are no longer appropriate, and that the appropriate bargaining unit for Vancouver Island is a single Island-wide bargaining unit for each Applicant employer.

The Applicants are stevedoring companies (Empire International Stevedores Ltd., Westcan Stevedoring Ltd., Canadian Stevedoring Company Limited and Western Stevedoring Company Ltd.) and general wharf operators (Westcan Terminals Ltd. and TimberWest Forest Limited - Stuart Channel Wharves Division and Canadian Stevedoring Company Limited). Westcan Terminals Ltd. operates at Victoria; Ogden Point Wharf, at Cowichan Bay; Duke Point and Assembly Wharf, at Nanaimo; TimberWest Forest Limited, at Crofton; the Canadian Stevedoring Company Limited, at Port Alberni. As for the Applicant stevedoring companies, they service all these areas. In addition, they load and/or discharge cargo at facilities that are operated by non-members of the BCMEA. These facilities are: Chemainus Wharf, operated by MacMillan Bloedel Limited; Harmac Wharf, operated by Harmac Pacific Inc.; Island

Phoenix, operated by MacMillan Bloedel Ltd.; Oxy Chemicals Wharf, operated by Oxy Chemicals Canada Ltd.; Esquimalt Graving Dock, operated by Public Works of Canada; and Crofton Pulp and Paper Wharf, operated by Fletcher Challenge Canada Ltd. (Crofton Pulp and Paper Division).

-II-

The Applicants are all represented by the British Columbia Maritime Employers Association ("BCMEA"), which is an employer organization that represents stevedoring companies, general wharf operators, bulk terminal operators and ship owners operating at various ports and/or harbour facilities in British Columbia. It is an association under the Code. It is empowered by its members to represent them in collective bargaining with the International Longshoremen's and Warehousemen's Union - Canadian Area, as was pointed out in the "Report of the Industrial Inquiry Commission into Industrial Relations at West Coast Ports," dated November 30, 1995 (IRC Report):

"The prime purpose of the BCMEA is to provide labour relations services and advice to its member companies in British Columbia. It deals with the ILWU Canadian Area and its various Locals with respect to collective agreement administration, disciplinary matters, grievances and arbitration. On behalf of its members, the BCMEA is responsible for negotiation of the coast wide collective agreement with the Canadian Area, and is party to that collective agreement. The BCMEA is also involved with various industry health and benefit plans, the training of longshore workers, waterfront safety and accident prevention, and workers' compensation claims.

The BCMEA is also responsible for ensuring that its member companies have sufficient qualified longshore workers on a day-to-day basis and, in this regard, participates in the registration of workers in the industry, and in the operation of the various dispatch centres with ILWU Locals. The BCMEA in fact actually operates the large dispatch centre in Vancouver, in the jurisdiction of Local 500."

(pages 60-61)

With respect to its internal organization, that Report further states:

"The responsibility for the management and direction of the affairs of the BCMEA is vested in a Board of Directors comprised of thirteen members. ...

Each of the Directors has one vote at a Directors' meeting.

In its internal preparations for each round of collective bargaining, the BCMEA divides the industry into three sectors: bulk, deep sea and dock. A BCMEA staffer works with member companies in each of these sectors to prepare and recommend proposals. The proposals from each sector are formed up into an overall package, which is presented to the Board of Directors for discussion and approval. It is this package which is presented to the union. The BCMEA's bargaining committee is comprised of the four members of the Executive Committee, the President and CEO, the Vice Presidents of Operations and Finance, and the Director of Labour Relations and Corporate Secretary. The President and CEO is the spokesperson. For ratification of any settlement, approval of the Board of Directors is required, followed by vote of the member companies, by secret ballot."

(page 63)

The Respondents, International Longshoremen's and Warehousemen's Union, Locals 503, 504 and 508, are members of the ILWU - Canadian Area. The geographical jurisdiction of Local 503 is Port Alberni; that of Local 504 is Victoria, including Cowichan Bay; and that of Local 508 is Chemainus, including Nanaimo, Ladysmith and Crofton. The ILWU - Canadian Area is composed of voluntarily affiliated autonomous locals. It is not a bargaining agent or a trade union certified by the CLRB, nor is it a council of trade unions pursuant to section 32 of the Code. Moreover, it is not certified as a bargaining agent at the provincial level. However, it is empowered by its autonomous Locals to represent them for the purpose of collective bargaining with the BCMEA. According to the Board's records, no bargaining agent certified by the Board and engaged in longshoring in British Columbia has ever transferred bargaining rights to the ILWU - Canadian Area.

The IRC Report describes the participation of Locals in the collective bargaining process involving the Canadian Area as follows:

"... Prior to the commencement of each round of negotiations, the Local Unions enter into a contract caucus, as provided for in Article 10 of the Canadian Area Constitution. Each Local Union is entitled to two delegates to the caucus, regardless of its size. Locals having more than 100 members are entitled to an additional delegate for each additional 50 members. In practice, the President of each Local is automatically one of the delegates. The contract caucus considers bargaining proposals which are developed in the Locals and by the Canadian Area Executive Board, and decides on a package to be presented to the employer.

The union's bargaining committee is comprised of the Presidents of the six largest Locals, each of which has a voice and a vote, and the President of the Canadian Area, who is the spokesperson. The President of the Canadian Area has a voice, but no vote. The First Vice President of the Canadian Area is sometimes included in the committee, as the incumbent of the position carries the responsibility for administering the resulting collective agreement.

Bargaining committee for a tentative settlement requires two thirds of the six Presidents to vote in favour of the package. If this level of support is achieved, the tentative settlement is referred to the contract caucus. If two thirds of the delegates to the contract caucus vote in favour, the settlement goes back for ratification by members at Local Union meetings. To be ratified, a settlement must be approved by a simple majority (50% + 1) of the overall membership of all of the Locals."

(pages 58-59)

The Applicant employers and the Locals are bound by a single common collective agreement negotiated between the ILWU - Canadian Area and the BCMEA. The collective agreement is in effect from January 1, 1996 until December 31, 1998 and affects all longshore workers in British Columbia. Both the BCMEA and the ILWU - Canadian Area have been negotiating single common collective agreements since 1972.

Against this background and to better understand the bargaining relationship between the BCMEA and ILWU - Canadian Area, it is useful to refer to some of the conclusions drawn in the IRC Report with respect to the history of collective bargaining between these two entities.

"Aside government intervention, which will be dealt in with more depth later, it seems to the Commission that there are more fundamental problems in the collective bargaining system in the long shoring industry that go to the very uniqueness of the industry itself. To begin with, the balance of power in collective bargaining is tilted in the ILWU's favour by virtue of the monopoly of labour supply that is created by the hiring hall system. Moreover, with employees being dispatched to work through the hiring hall system and most of them working for more than one employer on any day or any given week, there is no employer/employee relationship here as exists elsewhere. Respect, dedication and loyalty to one's employer are scarce commodities on the waterfront. Instead, there is deeply entrenched 'us versus them' attitude with the employees having an almost consuming loyalty to the ILWU. This is quite understandable in view of the fact that job opportunities in the hiring hall are their lifeblood. Therefore, it naturally follows that it is to the union that employees mainly look for their security.

It also naturally follows that, as each round of bargaining comes up, aside from the normal monetary demands, the paramount agenda for the ILWU and its members is to maintain and to protect the maximum number of jobs available for Daily dispatch. Any proposal from the employers' side that is perceived to diminish the membership's income or to threaten the number of those hiring hall job opportunities in any way, shape or form, is looked upon with hostility and is seen as a threat against their very livelihood, their existence, as well as everything that the longshoremen and their forefathers have fought for. This hostile attitude naturally deepens the adversarial rift between the parties and leaves very little foundation for any sense of reason on the employees' part when it comes to settling disputes over the terms and conditions of employment.

...

When work opportunities decline, it is the casuals who take the brunt of the lost job opportunities while the union members share the remaining work. This false sense of security reflects in the bargaining

process in that it tends to lessen the overall risk factor and renders the union members more likely to opt for strike action rather than allow their executive to make concessions at the bargaining table.

In the present setting then, why should union members settle for what is on the table now? Sooner or later, the ritual called negotiations will play out and grind to a halt; there will be a strike or lockout; someone will pull the plug on grain; there will be a public hue and cry; Parliament will intervene; there will be back-to-work-legislation; there will be plenty of overtime to make up for lost wages during catch-up; eventually, there will be a third party imposed settlement that will in all likelihood give them something more than they can get by settling now; there will be retro cheques as usual; they can now take a couple of months off to enjoy the extra money; the casuals will fill the void; they can return to work, still get the pick of the jobs and wait for the ritual to start over again. In sum, there is no real collective bargaining and a well-guarded insulation from reality.

Another example of union members undercutting the Canadian Area after it had apparently made a deal are the circumstances that led to the closure of the West Coast Ports in 1994. There, with a small monetary difference between them, the Canadian Area apparently vowed to the BCMEA that there would be no strike and that the ports would remain open.

However, a few union members at Chemainus broke ranks and closed that Vancouver Island port down. The BCMEA responded by locking out the rest of the employees, which closed down all of the other ports and stopped the movement of grain. The work stoppage lasted some thirteen days.

The point here is of course, twofold. It emphasizes the need for some form of prohibition to prevent union members from taking unilateral action during the critical final stages of collective bargaining without approval of the bargaining agent.

More importantly, it also identifies the internal structure of the ILWU as a significant part of the overall problem. Clearly, the 'grass roots' nature of the division of power controlling the decision making process within the ILWU, does not allow the union leadership to stray far from the basic collective bargaining agenda discussed above. Any move on the union executive's part that is perceived by the membership to be a threat to the number of jobs available through the hiring hall, usually means a short-lived term of office for those

involved. In effect, what really happens when it comes to dispute resolution in the longshore industry, is that the BCMEA is effectively dealing with the ILWU membership at large."

(pages 142-146)

Arguments of the Parties

1. The Applicant Employers

The Applicant employers argue that there are structural problems associated with the existence and operation of three dispatch offices on Vancouver Island, namely that the existence of three separate dispatch offices has caused labour shortages and has resulted in a mismatch of the supply of labour to the needs of the industry. Each of the Respondent Locals operates a separate dispatch office in the geographic area of the Local to service the work allocated within that Local's geographic jurisdiction.

Prior to 1990-1991, vessels were prioritized within each Local's jurisdiction.

"However, with the shift in work patterns, and the necessity for longshore workers to travel between Locals, this 'seniority' ranking created unfairness. For example, a ship might go to Cowichan Bay (within Local 504) and be worked by gangs made up from workers who travelled in from Local 508. If another ship with less 'seniority' then went to Chemainus (Local 508) the following day, the industry allocation would give priority to it, and the gangs would be recalled from Cowichan Bay, leaving the senior ship with a shortage of labour. A seniority based on a Vancouver Island-base ensures that a vessel will be serviced in accordance to its 'seniority', regardless of the fact that the workforce may travel from one Local to another."

In order to correct the unfairness of the situation, since 1990-1991 ships have been prioritized on an Island wide basis on a first-come, first-serve basis for the purpose of allocating available labour. However, the BCMEA submits that the structural problem remains: it allocates labour on an Island-basis, but gangs are dispatched by the Locals on a Local by Local basis. This results in labour shortages because rated employees (i.e. skilled) from a particular Local are reluctant to travel and work outside their jurisdiction since in so doing they would only be offered an unrated position (i.e. unskilled). Each Local operates its own dispatch office and does not recognize the seniority of employees coming from outside their jurisdiction. The Local's dispatch office keeps the rated positions for its most senior members. Thus, when employees within the Local's jurisdiction are insufficient to meet the labour requirements of a particular shift, the Local must communicate with the two other Locals to see if outside employees would be willing to travel to and work in another jurisdiction.

2. Locals 503, 504 and 508

The Respondent Locals submit that a successful review application pursuant to section 18 of the Code would undermine the multi-employer province-wide bargaining structure, which has been in place on a voluntary basis since 1972, as this would result in six separate certification orders for the companies operating on Vancouver Island. Thus, each bargaining unit would have the right to negotiate a separate collective agreement and eventually a separate right to strike.

The Respondents point to the history of collective bargaining in British Columbia. As they mention, the BCMEA, although not an employer nor an employer representative pursuant to the terms of the Code (sections 3, 33 or 34), and the ILWU - Canadian Area have negotiated a master collective agreement; this structure has worked in the best interests of the parties since then. Since 1972 bargaining has been conducted on a multi-employer industry-wide basis. As a result, the Respondents argue that what exists in

reality is a single bargaining unit encompassing all longshore workers in British Columbia.

As well, the Respondents submit that the section 18 application has no labour relations purpose. They argue that the dispatching problems do not arise from the existing collective bargaining structure, but rather flow from the provisions of the collective agreement that regulate the dispatch system. The creation of a single bargaining unit at each of the six companies' operations will not affect the provisions of the collective agreement. In the Respondents' view, the provisions in the collective agreement dealing with dispatching are issues that should be resolved at the bargaining table. In their view, the Applicants are seeking to achieve with this section 18 application what they have been unable to achieve during negotiations.

- IV -

It is important to emphasize that, although the Applicant employers and the Respondent Locals are bound by a single common collective agreement that applies to all longshore workers in British Columbia, it does not follow that a single bargaining unit encompassing all longshore workers in British Columbia exists. As was discussed above, the BCMEA is not an "employer" and the ILWU - Canadian Area is not a "bargaining agent" pursuant to the Code. Furthermore, there has not been any request that the Board make a ruling with respect to these entities. Each collective agreement negotiated must be ratified by each Local and approved by member companies of the BCMEA. The negotiating process results in a common collective agreement, that applies to a number of bargaining units, of which some have been certified, and others have been recognized voluntarily.

As mentioned, there are several certification orders and voluntary recognitions extant in this case. The original certifications are the following:

(1) ILA Local 503, for longshore workers employed by the Empire Stevedoring Co. Ltd. working at Port Alberni (1945);

(2) ILA Local 503, for longshore workers employed by the Canadian Stevedoring Co. Ltd. working at Port Alberni (1945);

(3) ILA Local 508, for longshore workers employed by the Empire Stevedoring Co. Ltd. working at Chemainus, Crofton, Nanaimo and Ladysmith (1947);

(4) ILA Local 508, for the Canadian Stevedoring Co. Ltd. working at Chemainus, Crofton, Nanaimo and Ladysmith (1947);

(5) ILA Local 504, for the Empire Stevedoring Co. Ltd., the Canadian Stevedoring Co. Ltd. and the Western Stevedoring Co. Ltd., which are represented by the Shipping Federation of B.C. working at Victoria, Cowichan Bay, James Island and Esquimalt Harbour (1957). (It appears from reading the file that a previous certificate was granted by the CLRB in 1954.)

On numerous occasions, the Board stated that certification orders have a continuing effect (Canadian National Railway (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41), pages 25; 335; and 1184; Télé globe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198), pages 309; and 118-119; Ghislaine Otis et al. (1987), 72 di 7; 19 CLRBR (NS) 16; and 88 CLLC 16,004 (CLRB no. 657), pages 17-18; 26-27 and 14,016; Canadian National Railway Company (1990), 83 di 29 (CLRB no. 832), pages 32-33; Canadian Broadcasting Corporation (1993), 92 di 95 (CLRB no. 1023), page 203; and Quebec North Shore & Labrador Railway Co. (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), pages 126; and 14,149), and remain in force until they are revoked by the

Board (New Brunswick Broadcasting Co. Limited (1988), 75 di 101 (CLRb no. 711), page 107). Because of their continuing effect, the Board has the power, under section 18, to review and amend orders that no longer correspond to reality.

Thus, the passage of time in and of itself does not cancel the effect of a certification order. Indeed, the Board was called upon to review, clarify or interpret the intended scope of the certification order issued by the Wartime Labour Relations Board (National) in Greyhound Lines of Canada Ltd. (1990), 83 di 1; and 91 CLLC 16,003 (CLRb no. 829); National Harbours Board (1980), 41 di 126; and [1980] 3 Can LRBR 265 (CLRb no. 261); and Canadian National Railway Company et al., Board file no. 3601-C, December 8, 1977.

Even where there were no employees in a particular bargaining unit, the Board considered the certification order "dormant" and refused to revoke the order in question (National Bank of Canada, Senneterre, Quebec Branch (1985), 63 di 54; 12 CLRBR (NS) 300; and 86 CLLC 16,029 (CLRb no. 539)). In addition, in Uranerz Exploration and Mining Limited (1978), 27 di 728; [1978] 2 Can LRBR; and 78 CLLC 16,135 (CLRb no. 129), the Board stated that it did not have jurisdiction to limit the life span of a certification order (page 733).

- V -

Application of Section 18 of the Code

The Board's powers to review are provided for in section 18, which reads as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

It is well established that the Board can review any order or decision it has previously made on its own motion: see Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661). It is also well established that in the review process of the existing original certification orders the Board may also review voluntary recognitions: see Cape Breton Development Corporation, *supra*; Amone Transport Limited (1998), 106 di 59; and 39 CLRBR (2d) 193 (CLRB no. 1220); and BTS Byers Transportation Systems Inc. (1993), 91 di 69 (CLRB no. 995).

In Télébec Ltée (1995), 99 di 1 (CLRB no. 1133), the Board described its role in the context of a global review as follows:

"... The objectives of the Code admittedly do not change whether we are dealing with the creation of one or more new units or with the reorganization of existing units: in any case, the objective is to encourage the signing of a collective agreement to provide a framework for collective labour relations.

In that sense, the Board's role is to provide, through the structure of bargaining units, an institutional framework within which bargaining can take place and which most accurately reflects the situation of the parties, having regard to the result sought.

It stands to reason that this task differs somewhat, depending on whether one is starting from scratch or whether there are already existing units. The emphasis will be, in the first case, on access to a collective bargaining process, and in the latter case, on the proper functioning of the structure (Island Medical Laboratories Ltd et al., no. B308/93, September 21, 1993(BCLRB)). ..."

(pages 11-12)

In past decisions dealing with section 18 of the Code, the Board has on occasion required that the applicant demonstrate that the existing bargaining structure was no longer workable or that there was a labour relations purpose for the Board's involvement. However, these decisions do not preclude the Board from taking into account other factors in disposing of an application for review (see Purolator Courier Ltd. (1993), 91 di 149

(CLRB no. 1003), page 157). This principle was also recognized in Canadian Broadcasting Corporation (1993), 92 di 95 (CLRB no. 1023):

"What is clear from these decisions, apart from the fact recognized by all that each is an individual case, is that it must be established that the units are not or are no longer appropriate, that they are complex or obsolete, depending on the vocabulary used in the particular decision. In other words, the applications have to be based on reasons associated with the organization of sound labour relations

Therefore, the Board will not welcome from an employer, any more than it would from a union, applications based on short-term opportunism that is designed, for example, to short-circuit the bargaining process. On each occasion, the Board must carefully weigh the reasons supporting the application in terms of the principles cited earlier, i.e. the definitive character of its decisions and the stability of labour relations. ..."

(pages 105-106; emphasis added)

- VI -

The BCMEA Allocation Committee is responsible for the allocation of labour across Vancouver Island, for all vessels and for all its members. The Committee meets on a daily basis, seven days a week. At the meeting, each member company indicates the number of gangs needed. Gangs are composed of rated (skilled) and unrated (unskilled) employees. The Committee allocates the gangs available based on seniority of ships. To this end, it will call ahead each Local to check how many gangs are needed. A labour shortage occurs when a stevedoring company requests a certain number of gangs, but is allocated a smaller number than requested.

Each Local on Vancouver Island operates its own dispatch office. If a ship arrives in the jurisdiction of a Local, then the Local's dispatch office puts gangs together. The

Local first gives its members the opportunity to fill the most desirable positions, that is, rated positions. If the available workforce in the Local is insufficient to meet the labour requirements for a particular shift, then the Local calls the two other Locals' dispatch offices in order to see if employees would be willing to travel to and work in its jurisdiction. However, as mentioned previously, a Local does not recognize the "seniority" of an employee travelling from another Local. Thus, a rated employee travelling from Local 508 (Chemainus) to work in the jurisdiction of Local 504 (Victoria) will only be offered an unrated position. As a result, rated employees are reluctant to travel to other jurisdictions since they are assigned unrated and often undesirable work.

Vancouver Island ports handle forest products almost exclusively. Over the years the nature of the work done by longshore workers has changed considerably. In the 1950s and 1960s the handling of forest products required a large manual and unskilled workforce. The 1970s and 1980s witnessed important technological changes, for example, the use of lifts, which have shifted the emphasis on skill rather than on physical capabilities.

For several reasons, namely the decline in the accessibility of forest products, the increase of the competition brought by new markets, and technological changes, there is less work available on Vancouver Island for longshore workers. For instance, the overall hours of work available to longshore workers on Vancouver Island has considerably decreased over the years. In 1968, there were 1 650 054 hours to be shared among the three Locals; in 1980, there were 853 000 hours; and in 1995, there were only 400 000 hours. In addition, there has been a shift in the work opportunities available from one Local to another. In general, there is less work available in Victoria, as the main work done is now done in Chemainus. For example, in 1962, Local 508 in Chemainus handled 37% of the cargo on Vancouver Island, the Victoria Local handled 33% and the Port Alberni Local handled 30%. In 1996, Chemainus handled 81% of the cargo on Vancouver Island, Victoria 6% and Port Alberni 13%.

As the Respondent pointed out, several factors can explain labour shortages, namely the number of ships arriving at the same time or the mix of skills available on that day. It is equally true that other British Columbia ports experienced labour shortages. For instance, in 1996 and 1997, Vancouver ordered a total of 18 354 gangs but were short 593, or 3.23%. For the same period, Vancouver Island was short 588 of the 4813 gangs requested. Furthermore, it was submitted to the Board that labour shortages in Vancouver were temporary and caused by the BCMEA's miscalculation of the number of workers who needed training for a particular position.

Other witnesses testified before the Board and gave a sense of the importance of labour shortages different companies were experiencing and the impact of such shortages on their business. The Director of Integrated Planning and Logistics for Fletcher Challenge Canada testified that for the 1996-1997 fiscal year on the 10/12 ocean vessels loaded per month on Vancouver Island, the company experienced 10 to 14 labour shortages. Fletcher Challenge formally raised its concerns with respect to these shortages with the BCMEA. Seaboard International Co. Ltd., an important company doing business on Vancouver Island, loaded 18 vessels at Crofton, of which 10 experienced labour shortages. In 1997 (up until August), 10 vessels were loaded, of which 5 experienced labour shortages. Furthermore, Canadian Transport Co. decided in 1992 to transfer its operations from the Port of Victoria to Fraser Port (Local 502) in order to minimize labour shortages.

Seaboard operates two "roll-on, roll-off" vessels on Vancouver Island. The cargo is destined for Japan and returns with cars manufactured in Japan destined for the American market. Mel Bjorndhal, Vice-President of Shipping for Seaboard International Co. Ltd., testified that based on his experience, it takes approximately four gangs working three shifts to service a "ro-ro" vessel. These 12 gangs represent approximately 85% of the workforce available on Vancouver Island. If the company must load more than one vessel on Vancouver Island, then it will not bring the vessel to the Island to load because of anticipated labour shortages.

As an alternative to avoiding anticipated shortages, the company has the lumber barged to Vancouver and has the vessel loaded at the Vancouver Port. For instance, in 1996, 99 million board feet of lumber were loaded at Crofton, on Vancouver Island, whereas 63 million board feet were barged from Crofton to Vancouver. In 1997 (up until early August), 48 million board feet were loaded at Crofton and 48 million board feet were scowed from Crofton to Vancouver. Of course, to barge lumber from Vancouver Island to Vancouver increases the operating costs for the company. About 20-30% of the lumber barged is for storage purposes and the rest, about 70-80%, is for labour shortages purposes or anticipated shortages. But more importantly, because the lumber is being barged out of Vancouver Island, longshore workers from the Island are losing work opportunities. In 1996, Seabord estimated that the lumber barged out of the Island represented "over 7000 men-hours lost for the locals on Vancouver Island" (taking into account time spent loading the barges). This is quite important considering that Seabord provides approximately 20 000 to 30 000 men-hours of work per year for cargo loaded on the Island and about 7000 to 10 000 men-hours per year for cargo barged out of Vancouver Island to Vancouver (in 1996).

The transfer of work opportunities from Victoria to Chemainus and Port Alberni has affected the number of hours longshore workers from the Victoria Local had to work outside their jurisdiction. For instance, in 1996, 71% of the total hours were worked in Victoria by the Victoria Local, and 29% were worked outside the Local's jurisdiction, mainly in Chemainus. In Port Alberni, 84% of the total hours were worked in Port Alberni, whereas 16% were worked outside the Local's jurisdiction. Finally, in Chemainus, 94% of the total hours were worked within the Local's jurisdiction, whereas 6% were worked outside the jurisdiction. These numbers indicate the considerable interchange between the workforces of the Locals.

Furthermore, the decline of work opportunities in Victoria has affected the possibility of training. Because there is less work available in Victoria, the BCMEA has little incentive to train Local 504 employees. The BCMEA must determine the training

requirements with respect to each of the three Locals on Vancouver Island; it cannot assess the needs on an Island-basis. For instance, Local 504 (Victoria) requested that the BCMEA provide training as winch driver and machine operator to some of its members. The employer association answered by stating that "there is an insufficient amount of work in the Victoria Local to sustain a viable training program" (letter dated October 8, 1997). Furthermore, employees from Chemainus and Port Alberni received topside training (1996-1997), while employees from Victoria with more seniority were ignored.

- VII -

The Appropriate Bargaining Unit(s)

In Quebec North Shore & Labrador Railway Co., supra, the Board set out some of the factors that come into play when determining the appropriate bargaining units in the context of a global review:

"... Without claiming to make an exhaustive list of these factors, we would note, inter alia, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of the industrial peace. The test may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective. However, it must always try to balance what are often divergent interests in determining viable bargaining units and in order to ensure effective bargaining and the most harmonious labour relations possible."

(pages 124; and 14,148; see also Télébec Ltée, supra)


In the present case, the appropriateness of the bargaining unit must be assessed having regard to the parties' current situation, the operation of the longshoring industry on Vancouver Island, bearing in mind its peculiarities. Evidence submitted to the Board indicates that employers on the Island draw on a regular basis the labour needed to service the ships and docks from the jurisdiction of the three Locals, without making any distinction between the Locals. However, as the evidence points out, at present, employees have no real incentive to travel outside their jurisdiction, and the BCMEA has no real incentive to develop training programs based on each of the Locals' jurisdiction because of the organization of the work.

In the Board's view, the bargaining structure in place on Vancouver Island no longer properly serves the bargaining process, is no longer effective in the application of the collective agreement and is no longer appropriate. The Board will therefore grant the application for review of the bargaining units. However, before doing so, the Board wishes to receive the parties' submissions on the way the bargaining structure should be amended. While the Applicants have requested the Board to issue six separate certification orders where each order would cover a single Island-wide bargaining unit for each Applicant employer, it appears to the Board that the conditions for a geographical certification pursuant to section 34 of the Code are present and that such a solution should be considered. Therefore, the Board requests the parties' submissions on this issue within two weeks of this decision, following which the Board will make its final determination.

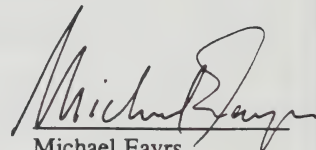
This is an interim decision of the Board pursuant to section 20(1) of the Code.



J. Philippe Morneault
Vice-Chair



Patrick H. Shafer
Member



Michael Eayrs
Member

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Summary

Benoit Brunet, *complainant*, and St. Lawrence & Hudson Railway Company Limited, *employer*.

Board File: 18590-C
CCRT/CLRB Decision no. 1239
December 22, 1998

On January 11, 1998, just after the ice storm, the applicant, a locomotive engineer, invoked his right to refuse to work under the Code because he felt that the slippery ground at the Saint-Luc switching yard constituted a danger to his safety and to that of his colleagues.

Because of the exceptional circumstances that existed during the ice storm crisis, the safety officer was unable to attend at the workplace where the refusal occurred. The investigation was therefore conducted by way of a conference call involving all of the parties. Following his investigation, the safety officer found that the situation did not constitute a danger within the meaning of the Code. He determined that the employer had taken sufficient steps to deal with the source of danger, despite the risk inherent in railway operations.

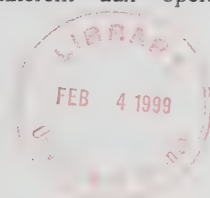
Résumé

Benoit Brunet, *requérant*, et Compagnie de chemins de fer St. Laurent & Hudson Limitée, *employeur*.

Dossier du Conseil: 18590-C
CCRT/CLRB Décision n° 1239
le 22 décembre 1998

Le 11 janvier 1998, au lendemain de la tempête de verglas, le requérant, un mécanicien de locomotive, a invoqué son droit de refuser de travailler en vertu du Code parce que, à son avis, l'état glissant du sol dans la cour de triage de Saint-Luc constituait un danger pour sa sécurité et celle de ses collègues de travail.

En raison des circonstances particulières de la crise du verglas, l'agent de sécurité fut lui-même dans l'impossibilité de se rendre sur les lieux du refus, avec la conséquence que l'enquête eut lieu par conférence téléphonique en présence de toutes les parties. À la suite de son enquête, l'agent de sécurité a jugé que la situation ne constituait pas un danger au sens du Code. L'agent de sécurité a déterminé que l'employeur avait pris des mesures suffisantes pour parer au danger et ce, malgré le fait qu'il s'agissait d'un risque inhérent aux opérations ferroviaires.



After inquiring into the circumstances of and reasons for the safety officer's decision, the Board confirmed that decision. The Board found that the safety officer's investigation was appropriate in the circumstances, in spite of the unusual form it had taken. On the merits, the Board concluded that the safety officer had correctly decided that having to walk on icy surfaces is part of the normal work of locomotive engineers and that, despite the sensational aspects of the ice storm crisis, the risks involved in the circumstances of this case were no greater than in "normal" icy weather, provided that the employees were careful and followed the safety instructions given to them.

Après avoir étudié les circonstances entourant la décision de l'agent de sécurité et examiné les motifs au soutien de celle-ci, le Conseil a confirmé la décision de l'agent de sécurité. Le Conseil a jugé qu'en dépit de la forme inhabituelle, l'enquête menée par l'agent de sécurité dans les circonstances était appropriée. Sur le fond, le Conseil conclut que c'est à bon droit que l'agent de sécurité avait déterminé que le fait de devoir circuler sur des surfaces glacées faisait partie du travail normal d'un mécanicien de locomotive et que, malgré les aspects sensationnels de la crise de verglas, les risques en cause n'étaient pas, dans les circonstances de l'espèce, plus grands qu'en temps glacé «normal», dans la mesure où l'employé était prudent et observait les consignes de sécurité qui lui avaient été données.

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Reasons for decision

Benoit Brunet,

applicant,

and

St. Lawrence & Hudson Railway Company
Limited,

employer.

Board File: 18590-C
CCRT/CLRB Decision no. 1239
December 22, 1998

The Board was composed of Ms. Véronique L. Marleau, Member, sitting as a single member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on July 14, 1998, at Montreal.

Appearances

Mr. Benoit Brunet, assisted by Mr. Glen Wightman, union legislative director, Quebec region, Brotherhood of Locomotive Engineers, for the applicant;

Mr. Glen D. Wilson, assisted by Mr. Matt Oliphant, Labour Relations Officer, St. Lawrence & Hudson Railway Company Limited, for the employer;

Mr. Raymond Robitaille, Safety Officer, for Transport Canada.

I

The Board has before it the referral of a safety officer's decision which found that no danger existed within the meaning of section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). The decision, issued following Benoit Brunet's refusal to work on January 11, 1998, was referred to the Board at Mr. Brunet's request in a timely manner and no preliminary issues were raised.

The applicant is employed by the St. Lawrence & Hudson Railway Company Limited as a locomotive engineer. His work requires him to walk near moving trains or rolling stock and to board and disembark from cars regularly and frequently. On Sunday, January 11, 1998, he was assigned to work at the Saint-Luc switching yard. The ice storm, the scope and extent of which are common knowledge, had just hit eastern Canada, including southwestern Quebec, and in particular, Montreal and the surrounding areas. The storm had begun on Monday, January 5, and a substantial amount of ice had built up on the ground and the cars.

Mr. Brunet had worked the two previous days, namely Friday, January 9, and Saturday, January 10, 1998. On Saturday, the freezing rain had stopped, the temperature had risen considerably and the mild weather had begun to melt the ice. On Sunday, however, the temperature fell suddenly to below -20° C and everything froze again. Later that day, all the bridges to the island of Montreal were closed because of falling ice. The City of Montreal eventually had to declare a state of emergency to deal with the problems caused by lengthy power outages in a number of strategic areas. The situation was such that the Canadian Armed Forces was called in to ensure public safety and provide assistance. During the relevant time period, the employer was negotiating with the Canadian government, which was looking for a place where the army could unload equipment. It also had to take the necessary steps to ensure that the trains would continue to operate in order to transport essential products such as propane gas and food to hospitals.

It was in this context that on Sunday, January 11, 1998, Mr. Brunet, who is also a union representative, went to meet with his supervisors before his shift began to ask them to take steps to improve the situation on "the diamond" — an area going across five or six tracks in front of the switching yard office — where the locomotives stop and set off again. The applicant complained that the area was very icy and that although he and his colleagues had put up with the situation the day before, they might not do so that day because they could no longer stand to work in those conditions. He requested that the area be sanded so it would be less slippery. That conversation took place at

approximately 7:50 a.m. Jim Blotsky, the employer's Manager, Field Operations for the Quebec region, was responsible for the operations of the switching yard throughout the relevant period. According to Mr. Blotsky, the diamond area was indeed very icy, but no more slippery than anywhere else in the yard. It was his view that although the area was important, it was less of a priority than some other areas where sanding was more essential. He told Mr. Brunet that he could not grant his request at that time because no staff were available but that it was one of the employer's priorities and would be done later that day. Mr. Brunet, who had made a similar request the day before, was not satisfied with that answer. He nevertheless began his shift at 8:00 a.m. as scheduled and continued working until 10:00 a.m. At that time, he again asked his supervisor to have the icy ground sanded right away, and he was again told that no staff were available and to be careful while he worked. It was then that Mr. Brunet formally refused to work. He told his supervisor that he was invoking his right to refuse to work under the Code because he felt that the slipperiness of the ground in the switching yard was a danger to his safety and to that of his colleagues.

The employer immediately gathered the employees together in the cafeteria and J. R. Jackson, Assistant Terminal Manager, met with them to discuss the situation. He asked who was refusing to work and Mr. Brunet said it was him. According to the applicant, the employees all agreed that the ground in the yard had to be sanded. Guy Abran, the employer's Safety and Health Co-ordinator, quickly joined Mr. Jackson and asked each of the employees whether they had their anti-skid equipment, that is, the individual protective equipment they had been given for working in icy conditions, such as spiked shoes or anti-skid rubbers. According to Mr. Brunet, some had the equipment while others did not. Some employees had never even received the anti-skid rubbers while others had requested them at the start of the ice storm but were unable to get any since there were no more available. He explained that he himself did not have his spiked shoes because they were in his locker at another workplace. In regard to the availability of the equipment, Mr. Blotsky said that he had ordered additional anti-skid rubbers as soon as the ice storm crisis began. However, the equipment was in great demand and orders were

delayed everywhere. He had finally sent Mr. Abran to Toronto to obtain more equipment, and Mr. Abran had come back Saturday night with about 75 additional pairs of anti-skid rubbers. According to Mr. Jackson, the employees knew that if they wanted additional equipment, they just had to ask. According to Mr. Brunet, the employees were not told in time that the additional equipment had arrived. In any event, this did not change the fact that the main problem was the failure to sand the ground.

Mr. Brunet reminded Mr. Abran that he had refused to work and that the employer must act on that refusal. Mr. Abran then took steps to notify a Labour Canada safety officer. However, Mr. Abran did not first contact a member of the safety committee of the Saint-Luc switching yard, contrary to the procedure set out in the Code for such cases. As the applicant noted, this meant that the parties were unfortunately unable to try to resolve the problem through the safety committee, which would certainly have been preferable. According to the employer, it was unable to reach a member of the safety committee because of the weather conditions in the Montreal area. This claim of the employer, which the safety officer treated as an established fact in his report, was later disputed by Bruno Caron, the co-chair of the safety committee. In a letter to the Board, Mr. Caron stated that no representative of the employer had called him to tell him that a colleague had refused to work on January 11, 1998.

Be that as it may, Mr. Brunet was nevertheless able to take advantage of the presence of a witness, Daniel Rochette, and Mr. Abran was able to reach a Transport Canada safety officer, Raymond Robitaille, on his cellular telephone at about 10:20 a.m. When informed of Mr. Brunet's refusal to work, Mr. Robitaille told Mr. Abran that he would conduct his investigation off the premises by holding a conference call with all of the people involved and would then make his decision by telephone. Mr. Robitaille explained that he was unable to attend at the site because of the weather conditions existing at the time. He stressed that he himself was in a disaster-stricken area, Sainte Hyacinthe, where he was busy relocating his family.

II

The conference call presided over by Mr. Robitaille took place at about 10:30 a.m. and involved the applicant, Mr. Brunet, his witness, Mr. Rochette (since there was no safety committee representative) and Messrs. Blotsky, Jackson and Abran. During the investigation, all of the parties agreed that the applicant's workplace was very slippery at the time of the refusal and that there was indeed a great deal of ice. When asked by Mr. Robitaille to describe the danger he feared, Mr. Brunet repeated his explanation that he had refused to work because the ground at the Saint-Luc switching yard was too slippery. He said that it was dangerous to walk near moving trains and locomotives in such conditions, that is, without any sanding of the yard and especially the diamond area in front of the yard office, which is a switching area for locomotives and other rolling stock.

Mr. Robitaille asked the employer's representatives and the applicant whether the employees had anti-skid equipment to work in the yard. Mr. Blotsky answered that all of the employees had spiked shoes and anti-skid rubbers. Mr. Brunet disputed that assertion, saying that some of the employees did not have their equipment.

The question of sanding was also discussed and Mr. Abran said that the sand had been ordered and that they were expecting it shortly. He stressed that the real problem was that there were no staff to do the work. Sanding was the responsibility of the track maintenance employees, but the available teams had all been dispatched elsewhere based on the action plan prepared by the employer. At the hearing, Messrs. Blotsky and Jackson explained to the Board that even though the diamond area was one of their priorities for sanding, it ranked only fifth or sixth in the employer's action plan. At the time of the refusal, two or three of the priority areas still required sanding before the diamond could be done. It was in this context that Mr. Blotsky asked the safety officer whether the employer could have the work done by other employees. Mr. Robitaille refused to decide

that question. Mr. Brunet stated that he had already said that the employees who worked in the switching yard would spread the sand themselves if necessary.

Mr. Robitaille then rendered his decision orally. He stated that because of the extreme conditions in the Montreal area, the employer, as a railway company, operated an essential service and that he therefore could not accept the danger alleged by the applicant as a basis for refusing to work. In his written report of February 2, 1998, he reasoned as follows:

"Because of the exceptionally icy conditions that were widespread in the Montreal area at the time of the refusal, the safety officer was able to appreciate the condition in the place at the time of the refusal. Therefore, he was able to issue his decision despite the fact that he was not present at the place where the refusal occurred, especially since a state of emergency had been declared in Montreal and the surrounding areas because of the icy conditions and power outages.

III. SAFETY OFFICER'S DECISION

The safety officer's role was to determine whether, at the time of the investigation, there was a danger to Mr. Benoît Brunet within the meaning of the Canada Labour Code, Part II. While Benoît Brunet's fear was certainly worth assessing, the steps taken by the employer prior to the safety officer's investigation were sufficient for guarding the source of danger, despite the risk inherent in railway operations.

The safety officer nevertheless asked the parties not to walk near moving trains or rolling stock. He also advised the employees to wait until the rolling stock had come to a complete stop, and this instruction applied to both boarding and disembarking.

In view of the circumstances, I conclude that there was no danger, as stated in the decision conveyed to the parties orally by telephone on January 11, 1998."

(page 3; translation)

After being informed of the safety officer's decision, the applicant informed the employer that he would comply with it and would continue working, although he still believed that

there might be a danger even where employees waited until the rolling stock had come to a complete stop before walking around.

The problem raised by Mr. Brunet ultimately disappeared shortly thereafter with the arrival of the sand. This occurred at almost the same time, between 10:45 a.m. and 11:00 a.m., and Mr. Blotsky instructed the employees to spread the sand themselves. This was done between 12:30 p.m. and 12:45 p.m. Over the following days, the ice that had built up on the ground of the switching yard during the ice storm was removed using heavy equipment, which required about 16 hours of work.

III

The Board's role when seized of a decision issued by a safety officer following a refusal to work made pursuant to section 128 of the Code, is to inquire into the circumstances of the decision and the reasons therefor to determine whether the safety officer correctly found, at the time of the investigation, that there was no danger within the meaning of the Code. In this context, the Board "must direct itself to the nature and to the sufficiency of the consideration which the safety officer had given to the safety issue and to the refusal" (Stephen Brailsford (1992), 87 di 98 (CLRB no. 921), page 107). The Board must put itself in the safety officer's position at the time of the investigation to determine whether or not there was a danger within the meaning of the Code. If the Board is of the opinion that the safety officer erred in deciding that there was no danger within the meaning of the Code, it must then, in respect of the machine, thing or place in respect of which the decision was made, give any direction that it feels the safety officer was initially entitled or required to give under section 145(2) of the Code.

To justify a refusal to work, the alleged hazard must constitute a danger within the meaning of the Code. This concept is defined as follows in section 122(1):

“‘danger’ means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.”

The assessment of the nature of the hazard in this context has an objective aspect that goes beyond the reasonable apprehensions of an employee who refuses to work (see Alan Miller (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243), pages 101; 350; and 752; where the Board commented to this effect on the standard of judgment it has to apply in deciding whether or not a danger exists).

As section 128(2)(b) of the Code provides, the danger that can justify a refusal to work must not be inherent in the employee's work or a normal condition of employment. On this point, the following comments from Antonia Di Palma (1995), 98 di 161 (CLRB no. 1131) are noteworthy:

“Commenting on the notion of danger in an earlier decision, the Board explained the distinction between what constitutes a normal condition of work and what is a dangerous working environment:

*‘A certain degree of danger exists in most occupations but the risk of injury naturally varies from industry to industry. For example, bank employees are not exposed to the dangers normally faced by miners. A steel erector's normal day's work contains extreme danger as compared with a letter carrier's and, we are now well aware of the risk of employment injury an asbestos worker is normally exposed to. Those are the normalities contemplated by subsection (12). It does not include unlawfully dangerous workplaces or workpractices regardless of how normal they may have become to employees. In short, **normal or standard work practices are a consideration when assessing whether or not a danger is so imminent that it prevents an employee from continuing to perform his duties.** A finding that imminent danger does not exist under section 82.1 does not necessarily mean that danger does not actually exist or that remedial action or further inquiry is not required.’*

(Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357), pages 26; and 551; *emphasis added*)

Although these observations were made before Parliament amended the Code's definition of danger, to remove from it the word 'imminent', they are still valid. In François Lalonde (1989), 77 di 9 (CLRB no. 731), the Board relied on these observations to define the issue before it and stated: 'The Board must always ask itself whether the alleged danger that the Labour Canada safety officer did not see fit to characterize as such does not in fact constitute a normal work practice for a given job' (page 11). That distinction was explained very clearly in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686):

'... For the purposes of these sections, which I believe are the only provisions in Part IV [now Part II] that refer to danger, the risk cannot be something that is inherent in an employee's work or a normal condition of employment (section 85(2)). For example, a steeplejack could not refuse to work at heights because of a personal fear of heights. Working at heights is inherent in a steeplejack's work and it is also a normal condition of employment. If, however, icy conditions prevailed, the steeplejack could refuse to work in those conditions and would receive the full protection of the Code. ...'

(pages 224; and 316)

*For all intents and purposes, removing the word imminent from the definition of danger has not changed its meaning. The notion of immediacy is still implicit in the sense that the Code's definition of 'danger' still contemplates 'a situation where the injury might occur before the hazard could be removed' (according to Labour Canada's definition of danger adopted by the Board in its decisions; see for example Alan Miller, *supra*, pages 104; 353; and 754; Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); Pierre Guénette (1988), 74 di 93 (CLRB no. 696); and Davis Pratt, *supra*, pages 223-224; and 315-316). Thus, in order to meet the Code's definition, the danger must be immediate and real: in other words, the risk to the employee must be serious to the point where the work must stop until the situation is rectified, i.e. the source or cause of danger removed. Evidently, this would not imply replacing one dangerous situation with another (see Eleanor Hasle (1991), 85 di 94 (CLRB no. 873)). This also means that the risk must not originate from the employee's personal condition. Furthermore, the danger must be one that Parliament intended to cover in Part II of the Code. Accordingly, this would exclude a danger arising from a situation where the risk is inherent in the employee's work or is a normal condition of work (section 128(2)(b): see by analogy Gilles Lambert (1989), 78 di 69 (CLRB no. 748), page 79)."*

*(Antonia Di Palma, *supra*, pages 177-178)*

IV

An assessment of the sufficiency of the safety officer's investigation is required in this case, since the officer did not go to the employee's workplace before concluding that there was no danger within the meaning of the Code. In this regard, the applicant argues that the safety officer's failure to personally observe the workplace before making his decision affected the validity of the investigation and thus casts doubt on the correctness of his decision. It will be recalled that to justify making his decision without being on site, Mr. Robitaille stated in his report that he *"was able to appreciate the condition in the place at the time of the refusal" ... "because of the exceptionally icy conditions that were widespread in the Montreal area at the time of the refusal"* (page 3).

In cases in which outside factors such as weather conditions are involved, the safety officer must normally examine the place in question immediately to determine whether or not there is a danger. The safety officer's presence at the place where an employee has refused to work is necessary to preserve both the integrity and the usefulness of the refusal process, by enabling the officer to base his or her decision on objective data and to make a timely decision when it is relevant for all of the parties involved.

In this case, everyone is agreed that the circumstances of the ice storm crisis were exceptional; so exceptional that the safety officer himself was unable to attend at the workplace before making his decision. Given this context, the Board is of the opinion that the safety officer's investigation, despite the unusual form it took, was appropriate and satisfactory in the circumstances because his failure to personally observe the condition of the place before concluding that the situation did not present a danger within the meaning of the Code did not infringe the applicant's rights. By holding a conference call in the presence of all of the parties concerned and allowing each of them to state their point of view, the safety officer did not violate the applicant's right to have the basis for his refusal considered objectively and fairly. The relevant facts that the safety officer had

to take into account to determine whether there was a danger within the meaning of the Code were admitted by all of the parties concerned and were made known to the safety officer. The only fact in dispute was the availability of individual protective equipment. The safety officer did not have to be on site to determine whether that equipment was necessary to work on icy ground without there being a danger within the meaning of the Code.

At the time of his investigation, Mr. Robitaille, who holds the position of Acting Regional Director, Operations and Equipment, Transport Canada Surface, and who has been working in the railway industry for 18 years, had personal knowledge of the situation and the scope of the problem as well as expertise in the normal and usual labour practices involved in the applicant's job. All things considered, the Board therefore finds that the investigation conducted by the safety officer off the premises in the circumstances of the ice storm did not infringe the applicant's right under section 129(1) of the Code to have the matter "investigate[d] in the presence of the employer and the employee or the employee's representative".

V

It must now be determined whether the safety officer was justified in concluding that the icy ground in the diamond area at the Saint-Luc switching yard did not constitute a danger within the meaning of the Code on Sunday, January 11, 1998, just after the ice storm. For this purpose, we must consider the factors described above that arise under section 128 of the Code. The relevant portions of the section read as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment. ...”

At the time of the safety officer's investigation, was it dangerous for the applicant to work in the place in question? Was there a real and immediate danger? If there was a danger, was one that Parliament wished to exclude because the situation and the risk were inherent in the employee's work or constituted a normal condition of employment?

The safety officer found that the danger alleged by Mr. Brunet could not justify a refusal to work within the meaning of the Code because that danger was inherent in his work. The applicant argues that the decision is wrong, since in reaching this conclusion the safety officer relied on an idea of the nature of danger based on a concept of “inherent exceptional risk” not found in the Code. The applicant also argues that in assessing the danger, the safety officer wrongly took account of the fact that in the circumstances of the ice storm crisis, the employer operated an essential service, since such a concept is not found in the Code either.

For its part, the employer stresses that no one disputes the exceptional nature of the circumstances that existed during the ice storm crisis. Everyone was affected by the devastating storm and it is owing to an unprecedented co-operative effort between the employees and the managerial staff that the railway was able to ensure the delivery of food, propane gas and military equipment during that time. The employer adds that it did everything it could to ensure that its employees remain safe and that the work be done

safely. The fact that no one was injured shows that employee safety was a real concern to the employer.

The employer argues that the conditions that existed at the applicant's workplace on January 11, 1998, did not meet the Code's definition of danger. Even without sand and individual protective equipment, the employees were able to work, provided that they were extremely careful.

VI

Mr. Brunet correctly asserts that the importance of the services provided or the fact that the employer operates or not an essential service has nothing to do with the risks that certain weather conditions may create. Such factors should not affect a safety officer's assessment of a risk for the purpose of determining whether it constitutes a real and immediate danger. The Code does not state that the concept of danger set out in section 128 must be looked at differently depending on the type of services provided by the employer and, in any event, this is not relevant to the assessment of the nature and seriousness of a danger.

In this case, the safety officer did refer to the fact that the employer was operating an essential service before finding that the risk in question was inherent in the applicant's work. This made the applicant think that this was the only reason the safety officer concluded that the risk in question did not constitute a danger within the meaning of the Code. The safety officer also stated that railway employees have to work in all possible weather conditions and that it was therefore inherent in the applicant's work to have to work in bad weather. Once again, his statement should have been qualified, since everything is a question of degree. For example, although working in high winds may be seen as inherent in the work of railway employees, the same could not be said if the wind suddenly turned into a tornado.

Be that as it may, and regardless of the statements that should have been qualified but were not in this case, the Board finds that the safety officer's decision was correct and that there is no need to vary his finding. The sensational aspects of the conditions caused by the ice storm crisis should not overshadow the real nature of the risk involved. Mr. Brunet acknowledged that he regularly works in icy conditions and that working on icy surfaces is inherent in his job. What he is arguing is that when he refused to work, the state of the switching yard was such that he was dealing not with normal conditions of employment but with exceptional circumstances. The safety officer did not agree, but instead expressed the opinion that working on icy surfaces in the railway industry — whatever the quantity of ice involved — is a normal condition of employment, regardless of whether the employee has anti-skid protective equipment or whether steps have been taken to make the ground less slippery.

The Board shares this opinion. In the Board's view, at the time of the refusal to work and the safety officer's investigation, the applicant — provided that he followed the procedure established by the employer, that is, being careful, working more slowly and not boarding or disembarking from moving trains — was able to work in the diamond area without being exposed to any more danger than he usually is when he has to work in icy conditions. Although the conditions at the applicant's workplace just after the ice storm were dramatic and exceptional, they did not constitute a danger within the meaning of the Code. Having to walk around on icy surfaces is part of the normal work of locomotive engineers, and the risks arising from such a situation remain acceptable provided that the employees are careful and follow the safety instructions given to them. The extent or thickness of the ice on the ground does not change the nature of the risk, which still has the same features. The safety officer found that where the ground is icy, as in this case, the only safety rule that must be followed is to work more slowly. According to the officer, it was not necessary to wear spiked shoes or anti-skid rubbers or to sand the ground so long as that precaution was taken. We accept that conclusion.

At the hearing before the Board, the employer established that for the entire duration of the ice storm, safety measures were increased to minimize the risk of accidents and injuries and the employees were instructed to walk around more slowly. Furthermore, employees were regularly reminded not to board or disembark from moving trains and rolling stock. The employer stressed that it chose to focus on employee safety even though it knew that productivity would be affected. According to Mr. Blotsky's uncontradicted testimony, the employer held 198 safety information meetings at the Saint-Luc switching yard during the period from January 6 to February 4, 1998, alone.

The applicant admitted that he was aware of the procedure to be followed and the employer's safety instructions. He also knew that having to work on the icy diamond without any sanding was temporary and that it was only a matter of time until the sand arrived and the staff responsible for doing the work were free. As the Board understands it, the heart of the problem was that after two days of work, Mr. Brunet and his colleagues could no longer stand to work on the bare ice, on which they had no foothold for operations that required strength, such as working the switches that were blocked by ice. They were also fed up with having to be careful every time they moved to avoid slipping.

VII

For all of the foregoing reasons, the safety officer's decision is accordingly confirmed. This conclusion does not mean however that Mr. Brunet's initial apprehension was not serious or that there was no danger in the broad sense of the term. As the safety officer noted, the applicant's fear was certainly worth assessing and, in the Board's opinion, the question was also worth clarifying for the future.



Véronique L. Marleau
Member

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Summary

Diane Rooney, *complainant*, and Canadian Union of Postal Workers, *respondents*, and Canada Post Corporation, *employer*.

Board File: 18441-C
CLRB/CCRT Decision no. 1240
December 23, 1998

The complainant was forced to change union when her initial position was declared surplus. While she did secure continued employment, her accumulated seniority was lost. Initially, this did not present a problem. However, as the result of a general grievance which had been filed by her new union prior to her job change, a number of positions including the complainant's new position eventually had to be rebid when the arbitrator ruled in the union's favour.

On the basis of her reduced seniority the complainant was assigned a much less desirable position.

Certain of the other employees who had been affected as a consequence of the union's general grievance were given damages. The Board found that such damages were restricted to individuals who had been occupying their positions at the time when the reorganization leading to general grievance by the union occurred.

Résumé

Diane Rooney, *plaignante*, Syndicat canadien des travailleurs et travailleuses des postes, *intimés*, et Société canadienne des postes, *employeur*.

Dossier du Conseil: 18441-C
CLRB/CCRT Décision n° 1240
le 23 décembre 1998

La plaignante a dû changer de syndicat lorsque le poste qu'elle occupait à l'origine a été déclaré excédentaire. Elle a réussi à trouver un autre emploi permanent, mais elle avait perdu l'ancienneté accumulée. Cela n'a pas posé de problème au début. Toutefois, à la suite d'un grief général déposé par son nouveau syndicat avant qu'elle change d'emploi, un certain nombre de postes, dont le nouveau poste de la plaignante, ont dû être attribués de nouveau lorsque l'arbitre a rendu une décision favorable au syndicat.

Du fait qu'elle avait moins d'ancienneté, la plaignante s'est vue attribuer un poste beaucoup moins intéressant.

Certains des autres employés qui avaient été touchés par le grief général du syndicat ont obtenu des dommages-intérêts. Le Conseil a conclu que seules les personnes qui occupaient déjà leur poste au moment de la réorganisation ayant mené au grief général du syndicat avaient droit à des dommages-intérêts.

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The Board found that because the complainant started with the new union after that date, the complainant's situation differed from that of the others affected and the rules respecting the allocation of positions based on seniority and those regarding eligibility for damages had not been applied arbitrarily in the case of the complainant. Her complaint of unfair representation was therefore dismissed.

Le Conseil a conclu que, la plaignante étant devenue membre du nouveau syndicat après cette période, sa situation différerait de celle des autres employés touchés et que les règles régissant l'attribution des postes en fonction de l'ancienneté et celles visant à déterminer l'admissibilité aux dommages-intérêts n'avaient pas été appliquées de façon arbitraire. La plainte de représentation injuste de la plaignante a donc été rejetée.

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REASONS FOR DECISION

Diane Rooney,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 18441-C
CLRB/CCRT Decision no. 1240
December 23, 1998

The Board was composed of Mr. J. Paul Lordon, Q.C., Chairman, Mr. Edmund Tobin, Vice-Chairman, and Mr. Michael Eayrs, Member. A hearing was held on October 27, 1998, in Toronto, Ontario.

Appearances

Mr. Terry Haycock, delegated representative for the complainant;
Mr. Michael Wright, counsel for the respondent union, Canadian Union of Postal Workers, assisted by Mr. John Van Donk and Mr. Wally Polischuk; and
Ms. Janine Benedet, counsel for the employer, Canada Post Corporation.

These reasons for decision were written by Mr. J. Paul Lordon, Chairman.

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Ms. Diane Rooney commenced employment with the Canada Post Corporation (CPC or the employer) at the Kitchener Mail Processing Plant on August 19, 1991 as a part-time postal clerk. She was initially a member of the Public Service Alliance of Canada (PSAC). A little more than a year later, Ms. Rooney's position was declared surplus. This would have rendered Ms. Rooney subject to lay-off in January 1993. However, management was prepared to offer Ms. Rooney a position as a midnight postal clerk in the Kitchener plant. Although that position would involve a change in union for Ms. Rooney from PSAC to the Canadian Union of Postal Workers (CUPW or the union), Ms. Rooney accepted.

At this point, Ms. Rooney had a piece of good fortune. During the week of January 10, 1993, a notice advertising the position of Preferred Assignment in the Priority Courier Section was offered to CUPW members. Only two CUPW members applied for the position. Although Ms. Rooney had almost no seniority as a CUPW member, she was successful when the other candidate withdrew her application.

Ms. Rooney then assumed the Priority Courier position, which she found suited her very well, and enjoyed her work immensely throughout 1993 and into 1994.

However, there were difficulties ahead for Ms. Rooney, because of a general grievance that had been filed by her new union CUPW, prior her to assuming her duties as Priority Courier.

On May 21, 1992, the employer had taken a decision to conduct certain downsizing and to rationalize positions in the Kitchener Plant. The effective date of the downsizing was set for September 21, 1992. The employer, thinking that the article of the applicable collective agreement relevant in the circumstances was article 13, followed the procedure provided for in that article. CUPW did not agree. In the fall of 1992, CUPW referred the issue to an arbitrator, Mr. Kenneth Swan, questioning what was the proper procedure in the circumstances. Mr. Swan found that the procedure provided for in article 53 of the collective agreement which deals with Job Security and Employment

Opportunities for Surplus Employees. should have been followed in the circumstances and not the provisions of article 13, which the employer had initially felt to be applicable.

According to the arbitrator's decision, as of the effective date of September 21, 1992, members of the bargaining unit who were adversely affected by the employer's decision to follow the article 13 procedure rather than the article 53 procedure should be awarded monetary damages for the loss that they suffered because of the employer's choice of process.

The arbitral decision also required that all of the movements and changes in positions subsequent to September 1992, based upon the incorrect article and improper process, had to be redone based upon the correct procedure.

When jobs were rebid on the basis of the correct procedure, because of her relatively junior level of seniority, Ms. Rooney lost the position that she had happily enjoyed through most of 1993 and early 1994.

Although, as noted, employees who had been adversely affected by the employer's choice of process were to be entitled to damages under the settlement, it was the understanding of the union and the employer, and the course followed in the implementation of the damage award, that only employees employed in the CUPW bargaining unit at the time of the September 1992 decision would be allowed compensation. On the basis of this interpretation and decision, Ms. Rooney was denied compensation under the relevant article 53, since her date of commencement had been in January, 1993.

The evidence before the Board in the present proceedings indicated that the interpretation which resulted in Ms. Rooney being denied compensation and forced to rebid for a position was applied consistently and not arbitrarily. It indicated that in all the circumstances, the interpretation of the employer and the union appeared reasonable, if not correct, and was certainly not negligent. The application of this interpretation did

not discriminate against Ms. Rooney, except in its effect: the position she lost in the rebidding process was not due to any undue discrimination, but rather to her lack of seniority. Seniority in such circumstances is a usual and properly relevant criteria.

In the circumstances, the union did comply with the requirements of section 37 and did treat Ms. Rooney fairly. In view of the rationally based resolution of a difficult situation, the allegation of negligence, bad faith or arbitrariness, in violation of section 37 of the Code, does not appear to have been established.

Ms. Rooney's expectation that she was eligible for compensation following the loss of her position requires some additional comment. Her expectation is evidently based on the fact that she was originally provided forms and given an indication that she might be eligible under the provisions of article 53 of the collective agreement. The union officials concerned subsequently changed their minds after a closer examination of the matter and advised her that she was ineligible for compensation.

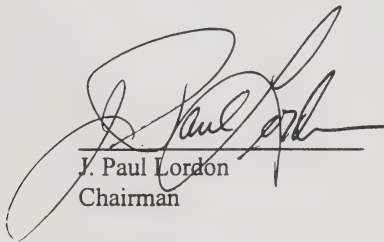
While Ms. Rooney did not give evidence in the present matter, Mr. Wally Polischuk, who is the regional grievance officer, Ontario region, for CUPW, did testify before the Board concerning these circumstances. He indicated that he had discussed Ms. Rooney's situation with Mr. John VanDonk, the President of the Kitchener CUPW local, and after careful and detailed consideration, they decided that a consistent enforcement of the settlement between the union and CPC and of the applicable policy would result in Ms. Rooney's ineligibility because she had not been a member of the bargaining unit at the time of the downsizing in September 1992. She had, as noted, only joined the CUPW bargaining unit in January 1993. Mr. Polischuk indicated that he personally advised Ms. Rooney of the decision that she was ineligible and of the reason for the decision.

Mr. VanDonk also testified. He indicated that, following his discussion with Mr. Polischuk about Ms. Rooney's situation, he too telephoned Ms. Rooney and explained to her that she did not have a claim for damages under article 53, as it was

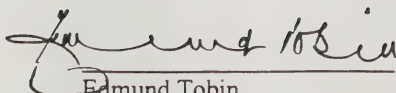
being interpreted and administered by the CPC and the union. Mr. VanDonk indicated that when he spoke with her, he explained in detail why she was not entitled to damages in his view and in the view of the union. At that time, according to Mr. VanDonk's testimony, Ms. Rooney told him that she felt the matter was resolved to her satisfaction. Since Ms. Rooney did not give evidence in the present proceedings, there is no indication presently before the Board as to why she changed her mind on the issue and filed the present complaint.

In the result, when the rebidding occurred, because of Ms. Rooney's lack of seniority, she eventually ended up with a part-time PO 4 position in Guelph. According to the evidence before the Board, her assignment to this position was in every way consistent with the level of seniority that she possessed in the CUPW.

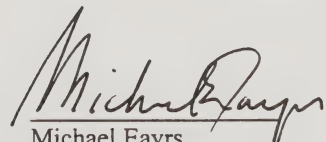
In the circumstances, no negligence or arbitrary behaviour occurred and there is no suggestion whatsoever of bad faith on the part of the union; Ms. Rooney's complaint is therefore dismissed.



J. Paul Lordon
Chairman



Edmund Tobin
Vice-Chairman



Michael Eayrs
Board Member

